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Give Me Liberty or Give Me . . . Alternatives?: Ending Cash Bail and Its Impact on Pretrial Incarceration

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Give Me Liberty or Give Me . . . Alternatives?

ENDING CASH BAIL AND ITS IMPACT ON PRETRIAL INCARCERATION

"No one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens but its lowest ones."[1]

INTRODUCTION

When police officers arrested seventeen-year-old Kalief Browder for allegedly stealing a backpack, they said, "We're just going to take you to the precinct. Most likely you will go home."[2] But Kalief Browder never went home, and instead, spent the next three years of his life languishing in a Rikers Island prison cell.[3] After police arrested Browder, a judge set his bail at $3,000, a fee that his family could not afford, and Browder spent years suffering in Rikers Island before the prosecution eventually dismissed his case.[4] After three years of jail time and nearly two years of solitary confinement, Kalief Browder committed suicide at the age of twenty-two.[5]

Unfortunately Browder's case is not an anomaly,[6] but a tragic example of the norm that is due in part to a cash bail system

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[1] Jennifer Lackey, *The Measure of a Country Is How it Treats its Prisoners. The U.S. Is Failing*, WASH. POST (Feb. 6, 2019), https://www.washingtonpost.com/opinions/the-measure-of-a-country-is-how-it-treats-its-prisoners-the-us-is-failing/2019/02/06/8df29acc-2a1c-11e9-984d-9b8fba003e81_story.html [https://perma.cc/TSN2-GFNP].

[2] Jennifer Gonnerman, *Before the Law*, NEW YORKER (Oct. 6, 2014), http://www.newyorker.com/magazine/2014/10/06/before-the-law [https://perma.cc/4EL9-DRVS] (internal quotation marks omitted).

[3] Michael Schwirtz & Michael Winerip, *Kalief Browder, Held at Rikers Island for 3 Years Without Trial, Commits Suicide*, N.Y. TIMES (June 8, 2015), https://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html [https://perma.cc/BT6Z-PX9G].

[4] *See* Peter Holley, *Kalief Browder Hanged Himself After Jail Destroyed Him. Then 'a Broken Heart' Killed his Mother*, WASH POST. (Oct.18, 2016); Wendy R. Calaway & Jennifer M. Kinsley, *Rethinking Bail Reform*, 52 U. RICH. L. REV. 795, 799 (2018).

[5] *See* Holley, *supra* note 4; Schwirtz & Michael, *supra* note 3.

[6] The havoc that cash bail has wreaked on defendant's lives is harrowing: Bill Peyser, a seventy-three-year-old cab driver with no prior criminal record, was charged with attempted murder when confronting his noisy neighbors. Despite eventually being found not

that disproportionally impacts minorities and the indigent.[7] The United States has a prison population of over two million; nearly five hundred thousand more than China, the next highest country.[8] Of this two million plus, around 540,000 people are pretrial detainees, or better put, these individuals have been arrested, but have not yet been convicted of a crime and are presumed to be innocent.[9] Even though the prison population has steadily increased in the last fifteen years, the conviction rate has remained stable, exhibiting that the "[d]etention of the legally innocent has been consistently driving jail growth."[10]

One of the main drivers of the growing rate of incarceration has been the cash bail system.[11] Congress had envisioned the cash bail system for the primary purpose of reducing pretrial crime and

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guilty on all charges, Peyser spent nearly six months in jail while awaiting trial because he could not afford his $625,000 bail; Richard Stanford, a sixty-three-year-old Vietnam veteran, spent weeks in jail for trespassing after being unable to post a $2,600 bail; Kenneth Humphrey, a retired black shipyard worker, was assessed a bail of $350,000 for stealing $5 and a bottle of cologne. *See* Scott Shackford, *Innocent Until Proven Guilty, But Only if You Can Pay*, REASON (July 14, 2018), https://reason.com/archives/2018/07/14/innocent-until-proven-guilty-b [https://perma.cc/3WBL-SPP5]; Arpit Gupta & Ethan Frenchman, *The U.S. Bail System Punishes the Poor and Rewards the Rich*, QUARTZ (Feb. 2, 2017), https://qz.com/900777/the-us-bail-system-punishes-the-poor-and-rewards-the-rich/ [https://perma.cc/EJ3F-87WA]; Evan Sernoffsky, *SF Inmate in Landmark Battle over Bail Wins Release*, S.F. CHRON. (May 3, 2018, 7:32 PM), https://www.sfchronicle.com/news/article/Judge-orders-defendant-in-legal-bail-battle-to-be-12885426.php [https://perma.cc/6DBE-58Z4].

[7] *See* Adam Looney & Nicholas Turner, *Work and Opportunity Before and After Incarceration*, BROOKINGS INST. (Mar. 2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf [https://perma.cc/4PPP-WAJ3] (finding that boys born into the bottom ten percent of income earners are twenty times more likely to end up in prison as young adults than those born into the top ten percent); Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENT'G PROJECT (June 14, 2016), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/ [https://perma.cc/E8HP-KND8] ("African Americans are incarcerated in state prisons at a rate that is 5.1 times the imprisonment of whites.").

[8] *Highest to Lowest—Prison Population Total*, WORLD PRISON BRIEF, http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All [https://perma.cc/UR5Z-9JGJ]. In fact, if every state in the U.S. was imagined to be an independent nation, twenty-three states would have higher incarceration rates than any other country. Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POL'Y INIT. (June 2018), https://www.prisonpolicy.org/global/2018.html [https://perma.cc/5EY3-XUGN].

[9] *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INIT. (Mar. 19, 2019), https://www.prisonpolicy.org/reports/pie2018.html [https://perma.cc/M7AU-YSSL].

[10] BERNADETTE RABUY & DANIEL KOPF, PRISON POL'Y INIT., DETAINING THE POOR 1 (May 10, 2016), https://www.prisonpolicy.org/reports/DetainingThePoor.pdf [https://perma.cc/A5YG-NY3C]; *see* MELISSA NEAL, JUST. POL'Y INST., BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 26 (Sept. 11, 2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf [https://perma.cc/QEW6-VEA2] ("A 2012 study suggested that . . . more than [fifty] percent of innocent defendants pled guilty to get a lower sentence rather than risk a conviction . . . .").

[11] *See* Jared Keller, *How the Money Bail System Perpetuates America's Mass Incarceration Problem*, PAC. STANDARD (Aug. 26, 2016), https://psmag.com/news/how-the-money-bail-system-perpetuates-americas-mass-incarceration-problem [https://perma.cc/5PDG-N58Z] ("[T]he use of money bail by judges to detain suspects ahead of a formal trial may actually be creating more criminals than it punishes."); Sawyer & Wagner, *supra* note 9.

flight,[12] but the majority of pretrial detainees are charged with nonviolent offenses, where these risks are exceedingly low.[13] Instead, the cash bail system has created a two-tiered system of injustice, akin to a modern-day debtor's prison, where the poor are imprisoned and the rich are released.[14]

The resulting inequities stemming from money bail regimes have grave consequences for both the pretrial detainee and the public at large.[15] Pretrial detainees have a tougher time mounting a defense and are much more likely to enter into guilty pleas and receive longer sentences than those who can afford bail.[16] The detention itself places a long-term toll on the defendant's mental health, current and future employment prospects, and family well-being.[17] From a societal perspective, these bail policies continue to strengthen the firm grip of institutional racism in the U.S. criminal justice system, with money bail disproportionately affecting minorities.[18] Furthermore, the financial cost of money bail places an enormous burden on American taxpayers and state budgets. In 2018, for example, the Hamilton Project estimated that pretrial detention "cost[] taxpayers roughly $11.71 billion each year."[19]

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[12] Originally, the sole reason for bail was to ensure a defendant reappeared in court. Following the Bail Reform Act of 1984, many jurisdictions now also factor in the defendant's dangerousness to the community. *See infra* Section I.B.

[13] *See* RAM SUBRAMANIAN ET AL., VERA INST. JUST., INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA, 5 (2015), http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/01/incarcerations-front-door-report.pdf [https://perma.cc/59PD-LMST] ("[N]early 75 percent of the population of both sentenced offenders and pretrial detainees are in jail for nonviolent traffic, property, drug, or public order offenses"); Christopher Ingraham, *Why We Spend Billions to Keep Half a Million Unconvicted People Behind Bars*, WASH. POST (June 11, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/06/11/why-we-spend-billions-to-keep-half-a-million-unconvicted-people-behind-bars/?utm_term=.7b0504b1c208 [https://perma.cc/RP4B-F5S8] ("[P]eople sit behind bars not because they're dangerous, or because they're a flight risk, but simply because they can't come up with the cash.").

[14] *See* Lorelei Laird, *Court Systems Rethink the Use of Financial Bail, Which Some Say Penalizes the Poor*, AM. B. ASS'N J. (Apr. 2016), http://www.abajournal.com/magazine/article/courts_are_rethinking_bail [https://perma.cc/RK2D-56FB] ("By conditioning freedom on the ability to pay, they say, bail systems needlessly imprison poor defendants who pose no threat. Meanwhile, wealthy people go free regardless of what danger they might pose.").

[15] *See infra* Part II.

[16] Cassie Miller, *The Two-Tiered Justice System: Money Bail in Historical Perspective*, S. POVERTY L. CTR. (June 6, 2017), https://www.splcenter.org/20170606/two-tiered-justice-system-money-bail-historical-perspective [https://perma.cc/R392-XF5M] ("For their crime of poverty, they pay in lost income, employment, and time with their families. They are more likely to plead guilty in order to avoid pretrial detention.").

[17] *See id.*

[18] *See* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272–73 (2004) ("African Americans experience a uniquely astronomical rate of imprisonment, and the social effects of imprisonment are concentrated in their communities."); Aida Chávez, *Bernie Sanders Introduces Bill to End Money Bail*, INTERCEPT (July 25, 2018, 1:30 PM), https://theintercept.com/2018/07/25/bernie-sanders-money-bail/ [https://perma.cc/7DU7-LAJC].

[19] PATRICK LIU ET AL., HAMILTON PROJECT, THE ECONOMICS OF BAIL AND PRETRIAL DETENTION 13 (2018), http://www.hamiltonproject.org/assets/files/BailFine Reform_EA_121818_6PM.pdf [https://perma.cc/ZL5N-YZCH].

States, in turn, have responded to these expenses by slashing funds to other programs, including higher education.[20]

The inequities and costs of cash bail have not gone unnoticed, as states like New Jersey, Philadelphia, California, and New York have all taken steps to end or reform the cash bail system.[21] As of 2018, California became the first state to statutorily eliminate money bail,[22] but its risk assessment tool—a tool many jurisdictions use in lieu of cash bail—poses troubling consequences.[23] Risk assessment tools are of questionable efficacy and their use can potentially perpetuate racial inequities. Other non-financial alternatives, like electronic monitoring, pose similar problems and ignore the fundamental presumption of innocence pretrial defendants should be afforded.[24]

The inhumane system of cash bail should not be replaced with troubling alternatives. Although alternatives like California's risk assessment tools and electronic monitoring are steps in the right direction, these alternatives still pose some of the same problems associated with cash bail. One example of an alternative procedure that has solved some of these problems is Washington, D.C.'s pretrial system, where cash bail has essentially been eliminated and replaced.[25] D.C.'s success can be traced to its strong presumption

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[20] Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1, 2, 2n.4 (2017).

[21] The New Jersey Criminal Justice Reform Act has nearly eliminated any reliance on cash bail, while Philadelphia District Attorney Larry Krasner has ended cash bail requirements for low-level offenses. California was the first state to statutorily eliminate the use of cash bail in the summer of 2018. *See* TCR Staff, *As Federal Bail Reform Stalls, States and Cities Act*, CRIME REP. (July 26, 2018), https://thecrimereport.org/2018/07/26/as-federal-bail-reform-stalls-states-and-cities-act/ [https://perma.cc/97S2-YPNH]; Vanessa Romo, *California Becomes First State to End Cash Bail After 40-Year Fight*, NAT'L PUB. RADIO (Aug. 28, 2018, 10:49 PM ET), https://www.npr.org/2018/08/28/642795284/california-becomes-first-state-to-end-cash-bail [https://perma.cc/N2R6-D52U]. On April 1, 2019, New York eliminated cash bail for the majority of misdemeanors and non-violent felonies. The bail reform law is set to go into effect in January of 2020. Julie McMahon, *New York Ends Cash Bail for Most: What it Means for People Charged with a Crime*, SYRACUSE.COM (Apr. 3, 2019), https://www.syracuse.com/news/2019/04/new-york-ends-cash-bail-for-most-what-it-means-for-people-charged-with-a-crime.html [https://perma.cc/6BXV-X7MK].

[22] Romo, *supra* note 21. While California was technically the first state to eliminate cash bail, Washington D.C. effectively eliminated the use of financial constraints in its criminal system in 1991. *See* Ann E. Marimow, *When It Comes to Pretrial Release, Few Other Jurisdictions Do It D.C.'s Way*, WASH. POST (July 4, 2016), https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-dcs-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7_story.html?utm_term=.6401416b0d6d/ [https://perma.cc/KVR8-FAWP].

[23] *See* Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1132 (2018) [hereinafter *Bail Reform*] (noting the substantial criticism leveled at risk assessment tools for their inaccuracy and dependence on racially biased data); *infra* Section III.A.

[24] *See infra* Part III for discussion on the drawbacks of relying on electronic monitoring and risk assessment tools.

[25] *See* Marimow, *supra* note 22.

towards release, procedural protections for pretrial defendants, and more humane pretrial services.[26] This system, however successful, still imposes some onerous pretrial restrictions and employs a risk assessment tool that utilizes racially biased socioeconomic inputs.[27]

State legislatures should take the successful framework of Washington, D.C.'s pretrial system one step further by releasing misdemeanor defendants on personal recognizance and providing greater procedural protections for felony defendants. The efforts of community bail funds across America have shown that a vast majority of defendants will return to court if adequately notified, exemplifying that pretrial restrictions are unnecessary punitive measures.[28] By releasing all misdemeanor pretrial defendants and ensuring adequate procedural protections for felony defendants, states can restore some semblance of humanity to our criminal justice system.

This note proceeds in the following four parts. Part I presents a brief history of cash bail and an overview of current pretrial practices. Part II addresses the importance of eliminating cash bail by showing the disastrous effects that the system can have on individuals, indigent and minority defendants, and the U.S. economy. Part III discusses two of the more popular alternatives to cash bail—risk assessments and electronic monitoring—and illustrates that these two alternatives pose equally troubling consequences as that of cash bail. Part IV offers the solution to ending cash bail: state legislatures should adopt bail reform laws that release misdemeanor pretrial defendants and restore adequate procedural protections for felony defendants.

I. HISTORY OF CASH BAIL AND CURRENT PRACTICES

The present problem of cash bail can be traced back to the passage of the Bail Reform Act of 1984 and its reversal of decades of progressive bail reform.[29] The Supreme Court's decision in *United States v. Salerno*, upholding the constitutionality of the Act, further aided the proliferation of the current cash bail system in the United States and helped contribute to the incarceration of

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[26] *See* COLIN DOYLE ET AL., HARV. L. SCH. CRIM. JUST. POL'Y PROGRAM, BAIL REFORM: A GUIDE FOR STATE AND LOCAL POLICYMAKERS 35–38 (Feb. 2019), http://cjpp.law.harvard.edu/assets/BailReform_WEB.pdf [https://perma.cc/4LAK-PBSQ].

[27] *See id.*; *infra* Section III.A.

[28] *See, e.g.*, *FAQ: What Should Replace Cash Bail?*, BAIL PROJECT, https://bailproject.org/faq/ [https://perma.cc/LJC3-TZW3] (noting that "[ninety-five percent] of [Bail Project] clients have returned for all their court dates, despite not having any of their own money on the line.").

[29] *See infra* Section I.B

millions of pretrial defendants.[30] Before addressing the history of cash bail, this note provides a brief overview of the bail process.

A. Basics of Bail

Bail laws vary state to state, but at a basic level, a person who is arrested is entitled to pretrial release except in a few rare cases.[31] A judge can release a pretrial defendant on personal recognizance (a promise to return to court), with conditions (i.e., electronic monitoring, drug testing, and/or pretrial service supervision), or on bail.[32] If a pretrial defendant is not released on personal recognizance, the court generally must justify the outcome with "a finding of a significant risk that the defendant will not appear at future court appearances or will commit a serious crime in the community during the pretrial period."[33]

A pretrial defendant can be released on bail pursuant to a secured or unsecured bond. An unsecured bond does not require an upfront payment for release, but if a defendant misses subsequent court dates he or she will owe the court money.[34] Secured bonds require the pretrial defendant to pay his or her bond amount first before securing release.[35] The amount of money the court requires the defendant to pay "as a condition of his release is that person's cash bail or money bail."[36] In some cases, a defendant can secure release by paying ten percent of the total bond amount directly to the court. In those cases, if the defendant makes their subsequent court appearances, the court will often return the ten percent amount.[37] But in most instances, when a defendant cannot afford to pay the bond set by the court, he or she must turn to a bail bonds agent. The agent, or surety, will make the payment for the pretrial defendant through a "surety bond."[38] If a defendant cannot afford the bail amount, "either personally or through a surety, they will remain incarcerated based on their inability to pay the money bail."[39]

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[30] *See* United States v. Salerno, 481 U.S. 739, 741 (1987); James A. Allen, *"Making Bail": Limiting the Use of Bail Schedules and Defining the Elusive Meaning of "Excessive" Bail*, 25 J.L. & POL'Y 637, 652–53 (2017) (noting that after *Salerno* pretrial detention rates increased because states amended their bail statutes to allow for more arrestees to be detained based on future dangerousness).

[31] *See Bail Reform*, *supra* note 23, at 1126–27.

[32] *Id.* at 1127.

[33] CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 5 (2016) [hereinafter BAIL PRIMER].

[34] *Id.* at 6.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] Rabuy & Kopf, *supra* note 10, at 1 n.6.

[39] BAIL PRIMER, *supra* note 33, at 6.

B. History of Cash Bail

The current cash bail system is deeply rooted in English law.[40] When the United States declared its independence, English law on pretrial detention had three elements: (1) a determination if a defendant had the right to be released on bail;[41] (2) a habeas corpus procedure; and (3) protection against excessive bail.[42] Initially, the American colonies embraced nearly all of England's bail practices, with some slight differences.[43] But cultural and social differences in beliefs about criminal justice, crime rates, and colonial customs led to a more liberal criminal penalty law in the American colonies.[44] For example, Pennsylvania, which served as "the model for almost every state constitution adopted after 1776," provided that nearly all prisoners shall be bailable with certain exceptions for capital offenses.[45]

Contributing to the progressive bail policies of the American colonies was the embrace of the English bail tradition of personal sureties.[46] Sureties "were unpaid and unreimbursed," and merely required a "promise[] to pay . . . in the event of default."[47] In fact, personal sureties and promises to pay were the foundation of the bail system adopted in the American colonies.[48]

The theoretical underpinning of these protections was "grounded in the presumption of innocence, an 'axiomatic and elementary' right to protect defendants prior to any finding of guilt."[49] The United States Constitution eventually codified these pretrial detainee protections in both the Eighth

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[40] *See* Kelly Allen, *The Evolution of Money Bail Throughout History*, BURNS INST. (Apr. 18, 2016), https://www.burnsinstitute.org/blog/the-evolution-of-money-bail-throughout-history/ [https://perma.cc/V3NK-D287].

[41] This was "answered by the Petition of Right," which contained "a long line of statutes which spelled out which cases must and which must not be bailed by justices of the peace or (in the early period) by sheriffs, and by the discretionary power of the judges of the king's bench to bail any case not bailable by the lower judiciary." TIMOTHY R. SCHNACKE ET AL., PRETRIAL JUST. INST., THE HISTORY OF BAIL AND PRETRIAL RELEASE 4 [hereinafter THE HISTORY OF BAIL] (Sept. 24, 2010), https://b.3cdn.net/crjustice/2b990da76de40361b6_rzm6ii4zp.pdf [https://perma.cc/MP7G-WMJF].

[42] *Id.*

[43] *Id.*

[44] *Id.*; *see also* TIMOTHY R. SCHNACKE, CTR. LEGAL & EVIDENCE-BASED PRAC., 'MODEL BAIL LAWS': RE-DRAWING THE LINE BETWEEN PRETRIAL RELEASE AND DETENTION 21 (Apr. 18, 2017) (noting America expanded the right to release to nearly all defendants and associated release "with liberty and freedom").

[45] THE HISTORY OF BAIL, *supra* note 41, at 4–5 (quoting June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 532 (1983) (internal quotation marks omitted)).

[46] Timothy R. Schnacke, *A Brief History of Bail*, 57 JUDGES' J. 4, 6 (2018).

[47] *Id.*

[48] *Id.*

[49] Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1411 (2017) (quoting Coffin v. United States, 156 U.S. 432, 454 (1895)).

Amendment's Excessive Bail Clause and the Judiciary Act of 1789.[50] These doctrinal protections remained the norm for nearly the next two centuries.[51]

In the 1800s, American bail practices started to change because personal sureties were no longer willing to take responsibility over defendants without payment.[52] American judges "began placing secured money conditions on defendants hoping they could 'self-pay.'"[53] When defendants were unable to pay their bail amounts, they asserted that the amounts were excessive. But American courts began claiming "that an amount was not excessive simply because it was unattainable."[54] As other countries began to also grapple with the loss of personal sureties, "America acted alone . . . when, in roughly 1900, it began allowing commercial sureties by gradually discarding the longstanding rules against profit and indemnification at bail."[55] Around this time, most courts began requiring secured conditions, or full payment of bail rather than a promise to pay, as a condition of release.[56] This increased use of commercial sureties became problematic as large inequities between those who could afford release and those who could not became apparent.[57]

During the 1960s, it appeared that Americans were rethinking the cash bail system and charting a course towards a more just pretrial procedure.[58] At that time, cash bail was thrust into the national spotlight as legislatures and the courts questioned the effectiveness of secured financial conditions.[59] In

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[50] *See* U.S. CONST. amend. VII ("Excessive bail shall not be required . . . ."); Stack v. Boyle, 342 U.S. 1, 4 (1951) ("From the passage of the Judiciary Act of 1789 . . . federal law has unequivocally provided that a person arrested for a noncapital offense *shall* be admitted to bail." (emphasis in original)).

[51] Yang, *supra* note 49, at 1411.

[52] Schnacke, *supra* note 46, at 6.

[53] *Id.*

[54] *Id.* (quoting TIMOTHY R. SCHNACKE, MONEY AS A CRIMINAL JUSTICE STAKEHOLDER: THE JUDGE'S DECISION TO RELEASE OR DETAIN A DEFENDANT PRETRIAL, at n.73 & accompanying text (Nat'l Inst. of Corrections 2014) (internal quotation marks omitted)).

[55] *Id.* at 7.

[56] *Id.*

[57] Allen, *supra* note 40.

[58] Robert Kennedy, then acting U.S. Attorney General, exemplified this reform-minded era when he stated: "'usually only one factor determines whether a defendant stays in jail before trial.' 'That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor simply is money.'" *Kennedy Scores Bail Injustices; Changes in System Urged by the Attorney General*, N.Y. TIMES (May 30, 1964), https://www.nytimes.com/1964/05/30/archives/kennedy-scores-bail-injustices-changes-in-system-urged-by-the.html [https://perma.cc/XH93-TTEY].

[59] *See* John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 2, 2 n.7 (1985) (listing reform efforts by legislatures, non-profits, and the courts in the 1960s); *see also* Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1071 (1954) ("The only resolution of the clash between bail and defendants' rights is to abandon the necessity of bail

response to the growing criticism directed at the efficacy of cash bail and the increasingly large bail amounts judges discretionally imposed, Congress passed the Bail Reform Act of 1966.[60] The Act attempted to reform America's criticized bail system by creating a presumption towards release for all non-capital defendants.[61] Furthermore, if a judge believed that release on recognizance would be inadequate in assuring the pretrial detainee's appearance at trial, the judge was to choose the least restrictive alternative condition.[62] Only those charged with capital offenses were given a different standard of release, a standard that factored in a defendants potential danger to the community.[63]

Many states began to emulate the Bail Reform Act's provisions, some going as far as relying solely on personal promises rather than financial conditions.[64] In the culmination of this reform-minded era, professional organizations issued standards in relation to bail issues at a national level.[65] The American Bar Association (ABA), for example, attacked the bail system's emphasis on financial constraints stating that the proposition "that risk of financial loss is necessary to prevent defendants from fleeing prosecution . . . is itself of doubtful validity."[66]

Despite impressive beginnings, these reforms began waning and many of the release on recognizance programs ceased operating or barely operated due to shaky financial and official support.[67] Initially, the sole congressional standard for assessing bail was set forth for the purpose of deterring a defendant's risk

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for defendants who are financially unable to obtain it, and if society can afford to take this risk with indigents, it can take it with all defendants.").

[60] Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214. The legislative history of the act explicitly stated the problems of the cash-centered bail system: "The present system of monetary bail would be adequate if all could afford it. The facts, however, are to the contrary. The rich man and the professional criminal readily raise bail regardless of the amount. But it is the poor man, lacking sufficient funds, who remains incarcerated prior to trial." H. REP. NO. 89-1541 (1966) *reprinted in* 1966 U.S.C.C.A.N. 2293, 2299.

[61] *See* Bail Reform Act of 1966, 80 Stat. at 214; THE HISTORY OF BAIL, *supra* note 41, at 12.

[62] *Id.*

[63] THE HISTORY OF BAIL, *supra* note 41, at 12; *see also* Calaway & Kinsley, *supra* note 4, at 800–01.

[64] *See* THE HISTORY OF BAIL, *supra* note 41, at 12–13.

[65] *See* PA. COMM. FOR CRIM. JUST. STANDARDS & GOALS, THE CRIMINAL JUSTICE STANDARDS AND GOALS OF THE NATIONAL ADVISORY COMMISSION DIGESTED FROM A NATIONAL STRATEGY TO REDUCE CRIME 53 (1973) ("The Commission believes that a person's financial resources should not determine whether he is detained prior to trial."); AM. B. ASS'N CRIM. JUST. STANDARDS COMM., ABA STANDARDS FOR CRIMINAL JUSTICE, PRETRIAL RELEASE 31 (3d ed. 2007) ("[T]he bail system as it now generally exists is unsatisfactory from either the public's or the defendant's point of view.").

[66] AM. B. ASS'N CRIM. JUST. STANDARDS COMM., *supra* note 65, at 31.

[67] THE HISTORY OF BAIL, *supra* note 41, at 16.

of flight.[68] In fact, the 1966 Bail Reform Act "did not expressly permit a judge to consider the defendant's future dangerousness or community safety during the release decision" for non-capital offenses.[69] But, as with many rash restrictions on liberty, the death knell for bail reform was ushered in under the banner of law and order and racially-charged rhetoric.[70]

The Nixon administration first attempted to strike against the Bail Reform Act of 1966 by unsuccessfully lobbying for an amendment to allow for preventative detention; in other words, allowing a judge to consider a defendant's potential danger to the community in setting bail.[71] Congressional compromise led to the passage of the District of Columbia Court Reform and Criminal Procedure Act of 1970, which expressly allowed D.C. to put community safety on equal footing with risk of flight in setting a bail amount.[72]

Due to highly publicized violent crimes committed by released pretrial defendants and growing public dissatisfaction with crime, Congress enacted the Comprehensive Crime Control Act of 1984, which included the Bail Reform Act of 1984.[73] The Act amended the Bail Reform Act of 1966 to include dangerousness to the community as a factor in assessing bail due to "the alarming problem of crimes committed by persons on release."[74] The 1984 Act contained numerous provisions that helped lead to the current system.[75] First, the Act allowed a judge to exercise even more

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[68] *Id.* at 14. "It must be remembered that under American criminal jurisprudence pretrial bail may not be used as a device to protect society from the possible commission of additional crimes by the accused." H. REP. NO. 89-1541 (1966) *reprinted in* 1966 U.S.C.C.A.N. 2293, 2296.

[69] THE HISTORY OF BAIL, *supra* note 41, at 14.

[70] *See* Calaway & Kinsley, *supra* note 4, at 804 ("As calls to get 'tough on crime' came from both the Reagan Administration and the public, judges responded by setting high financial bonds for pretrial defendants." (citing Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 364–66 (2010)); *see also* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 165–66 (2016) (noting the shift from a rehabilitation minded justice system to one focused on punitive measures).

[71] Samuel Wiseman, *Discrimination, Coercion, and the Bail Reform Act of 1984: The Loss of the Core Constitutional Protections of the Excessive Bail Clause*, 36 FORDHAM URB. L.J. 121, 135, 139 (2009).

[72] District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473; Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 512 (1986).

[73] *See* Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended at 18 U.S.C. §§ 3141–3150 (2012 & Supp. V 2018)); THE HISTORY OF BAIL, *supra* note 41, at 17.

[74] United States v. Salerno, 481 U.S. 739, 742 (1987) (quoting S. REP. NO. 98–225, at 3 (1983) (internal quotation marks omitted)).

[75] For example, every defendant charged with a felony drug offense is subject to detention. *See* Thomas E. Scott, *Pretrial Detention Under the Bail Reform Act of 1984: An Empirical Analysis*, 27 AM. CRIM. L. REV. 1, 33 (1989). This is especially problematic considering that the "war on drugs" has had a disparate impact on African Americans, who as a group are targeted and arrested by police officers for non-violent drug offenses at a higher

discretion than the 1966 Act by expressly allowing consideration of community safety in deciding whether to detain a pretrial defendant.[76] This increased discretion can be problematic when one considers a judiciary that is often out of step with the jurisdiction they preside over and the inherent racial biases, be it implicit or explicit, against minority defendants.[77] Furthermore, the idea that "future dangerousness" can be accurately predicted is widely considered to be false in both the science and psychiatry community.[78] Second, "the Act create[d] a rebuttable presumption toward confinement when the person has committed certain delineated offenses, such as crimes of violence or serious drug crimes."[79] The list of drug offenses satisfying the "serious drug crime" category had the effect of disproportionately imprisoning minority defendants.[80] Lastly, the Act provided defendants with minimal procedural protections from the prosecutors seeking to confine them:

> [T]he Act contains little to balance out the reliance on predicting dangerousness for the defense side. Evidence of other crimes may be

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rate than any other race. *See* andré douglas pond cummings, *"All Eyez on Me": America's War on Drugs and the Prison-Industrial Complex*, 15 J. GENDER, RACE & JUST. 417, 418 (2012). Furthermore, while detention of minorities for soft drug crimes has been increasing since the 1970s, violent crime rates have decreased over the last two decades. Michael Tonry, *Why Are U.S. Incarceration Rates So High?*, 45 CRIME & DELINQ. 419, 422–23 (1999).

[76] Bail Reform Act of 1984, 98 Stat. at 1977 (codified as amended at 18 U.S.C. § 3142(c) (2012 & Supp. V 2018)).

[77] *See* TRACEY E. GEORGE & ALBERT H. YOON, AM. CONST. SOC'Y L. & POL'Y, THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS?, at 3 (2016) ("People of color make up roughly four in ten people in the country but fewer than two in ten judges; and, in sixteen states, judges of color account for fewer than one in ten state judges."). Empirical evidence has demonstrated that race and ethnic bias can contribute to disproportionate treatment of minorities in the setting of bail, use of peremptory challenges, plea bargaining, and obtaining adequate defense representation. Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 47–48 (1994).

[78] *See* Barefoot v. Estelle, 463 U.S. 880, 920 (1983) (Marshall, J., dissenting) (quoting the American Psychiatric Association's *amicus curiae* brief "[t]he unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession." (internal quotation marks omitted)); Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1336 (2012) (discussing the theory of predicting future dangerous and noting "[b]oth judges and academics have challenged the bases for this type of determination, however, putting the entire theory to question"); Jack F. Williams, *Process and Prediction: A Return to A Fuzzy Model of Pretrial Detention*, 79 MINN. L. REV. 325, 335 (1994) (stating that numerous courts and legal commentators have recognized scientific studies that illustrate the unreliability of predictions of future dangerousness).

[79] *Glossary of Terms and Phrases Relating to Bail and the Pretrial Release or Detention Process*, PRETRIAL JUST. INST. (2015); *see* Bail Reform Act of 1984, 98 Stat. at 1978–79 (codified as amended at 18 U.S.C. § 3142(e)(2) (2012 & Supp. V 2018)).

[80] *See* Darren Lenard Hutchinson, *Who Locked Us Up? Examining the Social Meaning of Black Punitiveness*, 127 YALE L.J. 2388, 2400 (2018) (reviewing JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017)) ("As many commentators have demonstrated, the 'War on Drugs' has severely impacted 'low-income African American communities.'").

> presented as hearsay, which is not subject to cross-examination. There is no notice to defendants that prosecutors may seek pretrial detention based on prior crimes or behavior. Additionally, the 1984 Act does not require that there be any confrontation between the defendant and the prosecutor who proffers the evidence.[81]

The Act survived a constitutional challenge in *United States v. Salerno*, where the Supreme Court held that the Act violated neither the Fifth Amendment's Due Process Clause nor the Eighth Amendment's Excessive Bail Clause.[82] As to the respondent's due process challenge, the Court held that Congress had a compelling and legitimate interest in preventing danger to the community.[83] The Court grounded this ruling on the notion that the congressional purpose in passing the Act was not to *punish* pretrial defendants but instead the Act was a form of *regulation*.[84] The Court also minimized the respondent's contention that predictions of future dangerousness are inaccurate, stating "there is nothing inherently unattainable about a prediction of future criminal conduct."[85] In addressing the respondent's Eight Amendment contention, that the right to bail should be calculated solely based on consideration of flight and not future dangerousness, the Court held that nothing in the Eighth Amendment precludes a court from considering factors other than risk of flight.[86]

With that ruling, the *Salerno* Court solidified the constitutionality of detention based on pretrial dangerousness, a ruling that has since contributed to the imprisonment of innumerable pretrial detainees.[87] Justice Marshall eloquently summed up the impact of the decision in his dissent:

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[81] Appleman, *supra* note 78, at 1331 (footnotes omitted).

[82] United States v. Salerno, 481 U.S. 739, 741 (1987).

[83] *Id.* at 752.

[84] *Id.* at 747–48. Justice Marshall's dissent highlighted this false dichotomy when he stated "[t]he majority concludes that the Act is a regulatory rather than a punitive measure. The ease with which the conclusion is reached suggests the worthlessness of the achievement." *Id.* at 759 (Marshall, J., dissenting).

[85] *Id.* at 751 (majority opinion) (quoting Schall v. Martin, 467 U.S. 253, 278 (1984) (internal quotation marks omitted)); *cf.* Barefoot v. Estelle, 463 U.S. 880, 920 (1983) (Marshall, J., dissenting) (quoting the American Psychiatric Association's *amicus curiae* brief "[t]he unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession"); Williams, *supra* note 78, at 335.

[86] *Salerno*, 481 U.S. at 752–53.

[87] The Salerno decision, by ratifying a state's ability to detain individuals based on their potential dangerousness, led to an increase in the rate of pretrial incarceration. *See* Allen, *supra* note 30, at 653 (noting that, after Salerno pretrial detention rates increased because states amended their bail statutes to allow for more arrestees to be detained based on future dangerousness). Furthermore, by rejecting the contention that predicting future dangerousness is inaccurate, the Salerno decision helped contribute to the pretrial detention of the innocent. *See* Michael J. Eason, *Eight Amendment—Pretrial Detention: What Will Become of the Innocent?*, 78 J. CRIM. L. & CRIMINOLOGY 1048, 1066 (1988) (Even those who favor some form of pretrial detention agree that "the risk of

> Throughout the world today there are men, women, and children interned indefinitely, awaiting trials which may never come or which may be a mockery of the word, because their governments believe them to be "dangerous." Our Constitution . . . . cannot protect us if we lack the courage, and the self-restraint, to protect ourselves. Today a majority of the Court applies itself to an ominous exercise in demolition. Theirs is truly a decision which will go forth without authority, and come back without respect.[88]

While States are free to fashion their own bail practices, these practices must still adhere to a constitutional floor.[89] *Salerno* allowed this constitutional floor to include fear-based detention.

C. Current Practices

After the passage of the Bail Reform Act of 1984 and the *Salerno* decision, states began to adopt the federal position's emphasis on factoring in an individual's dangerousness to the community,[90] effectively reversing any momentum from the previous bail reform era.[91] These state statutes reflected the influence of tough on crime rhetoric[92] and effectively increased the use of pretrial incarceration.[93] In essence, "nearly every state has incorporated . . . two purposes for bail": community safety and

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erroneous detention under the Bail Reform Act [of 1984] is uncomfortably high."); Craig Ethan Allen, Case Note, *Pretrial Detention and the Loss of Innocence,* United States v. Salerno, 11 HAMLINE L. REV. 331, 344–45 (1988) (due to the inaccuracy of predicting future dangerousness, judges might err on the side of detention in close cases thereby "ensuring a 'larger number of erroneous confinements—that is, confinements of persons predicted to engage in violent crime who would not, in fact, do so.'") (quoting Alan M. Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions*, 23 J. LEGAL EDUC. 24, 32 (1970)).

[88] *Salerno*, 481 U.S. at 767 (Marshall, J., dissenting).

[89] *See* ALLISON M. SMITH, CONG. RESEARCH SERV., LSB10220, STATE MONEY-BAIL SYSTEMS: DIFFERING APPROACHES 2 (2018), https://fas.org/sgp/crs/misc/LSB10220.pdf [https://perma.cc/4CPT-CQ9U].

[90] These bail provisions have come to be known as "preventative detention" statutes. Michael W. Youtt, Note, *The Effect of* Salerno v. United States *on the Use of State Preventive Detention Legislation: A New Definition of Due Process*, 22 GA. L. REV. 805, 836 (1988).

[91] THE HISTORY OF BAIL, *supra* note 41, at 18 ("By 1999, it was reported that at least [forty-four] states and the District of Columbia had statutes that included public safety, as well as risk of failure to appear, as an appropriate consideration in the pretrial release decision." (citing EVIE LOTZE ET AL., PRETRIAL SERVS. RES. CTR., THE PRETRIAL SERVICES REFERENCE BOOK 12 (1999)).

[92] *See* Calaway & Kinsley, *supra* note 4, at 804 ("Judges do not want to appear soft on crime and are acutely aware that they may be held responsible if crimes are committed during the pretrial period."); Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 320 (1997) (noting New York politicians often dole out criticism for bail decisions adverse to the prosecution).

[93] *See* SUBRAMANIAN ET AL., *supra* note 13, at 7 ("By every measure, the scale at which jails operate has grown dramatically over the past three decades. The number of annual admissions nearly doubled, from six million in 1983 to 11.7 million in 2013.").

flight risk.[94] These standards typically make judges exercise individual determinations based on factors like: "the nature and circumstances of the offense charged, the weight of the evidence, family ties, employment, financial resources, and character and mental condition of the defendant."[95]

Despite the Supreme Court's emphasis on individual bail determinations,[96] many states have also adopted the bail schedule, a procedural device that eradicates any sort of individualized inquiry into a defendant.[97] Bail schedules are guidelines that provide judges with standardized bail amounts based solely on the offense charged, thereby ignoring the individual characteristics of a defendant.[98] These systems, which can be mandatory or merely advisory, usually provide a minimum, maximum, "or a range of sums to be imposed for each crime."[99] In one survey, sixty-four percent of county respondents indicated that they utilized some form of a bail schedule.[100] The problem with uniformly imposing such bail amounts is that these systems, in effect, operate to imprison pretrial detainees often charged with low-level crimes.[101]

Driven by the injustice of cash bail, a new bail reform wave is currently occurring, where many prosecutors, defense attorneys, and judges agree that the system is ineffective and needs to be replaced.[102] Many alternatives to money bail have been both proposed, and in some cases, adopted by states and counties throughout the United States.[103] In order to understand

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[94] *See* Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion*?, PRETRIAL JUST. INST. (Dec. 6, 2010), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=b646a57f-6399-2fe4-5683-021480c3634a [https://perma.cc/L8PZ-RY7V].

[95] *Id.* (citing MINN. R. CRIM. P. 9.02; N.J. COURT RULES, R. 3:26-1; MONT. CODE ANNO. § 46-9-109; WYO. R. CR .P. RULE 46.1 (2010)).

[96] *See* Stack v. Boyle, 342 U.S. 1, 4 (1951) (holding that the calculation of bail "must be based upon standards relevant to the purpose of assuring the presence of that defendant. The traditional standards, as expressed in the Federal Rules of Criminal Procedure, *are to be applied in each case to each defendant*" (emphasis added) (footnote omitted)).

[97] Allen, *supra* note 30, at 641, 653–55.

[98] Carlson, *supra* note 94.

[99] *Id.*

[100] PRETRIAL JUST. INST., PRETRIAL JUSTICE IN AMERICA: A SURVEY OF COUNTY PRETRIAL RELEASE POLICIES, PRACTICES AND OUTCOMES 7 (2009), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=d4c7feb2-55be-ccd0-f06a-02802f18eeee [https://perma.cc/7QQA-WPUX].

[101] Jessica Brand & Jessica Pishko, *Bail Reform: Explained*, APPEAL (June 14, 2018), https://theappeal.org/bail-reform-explained-4abb73dd2e8a/ [https://perma.cc/5F4K-W8GH] ("Often, those being held on bail have simply been accused of low-level offenses. Seventy-five percent of pretrial detainees have been charged with only drug or property crimes.").

[102] *See* BAIL PRIMER, *supra* note 33, at 4.

[103] *See* Bryce Covert, *America is Waking Up to the Injustice of Cash Bail*, NATION (Oct. 19, 2017), https://www.thenation.com/article/america-is-waking-up-to-the-injustice-of-cash-bail/ [https://perma.cc/W2PQ-QG6W] (noting the success of the Bail Reform Act in D.C. and the replacement of cash bail with risk assessments in New Jersey and Kentucky).

how these alternatives fall short of the mark, it is necessary to first dive deeper into the effect the inability to afford bail can have on a pretrial detainee's life and on society as a whole.

II. THE EFFECTS OF CASH BAIL

Pretrial detention, as a consequence of the inability to afford bail, can have disastrous effects on an individual. Even an imprisonment of "a few days . . . can increase the likelihood of a sentence of incarceration and the harshness of that sentence, reduce economic viability, promote future criminal behavior, and worsen the health of those who enter."[104] The community-level consequences to minority and indigent defendants are even more abhorrent to any idea of justice, with an exceedingly disproportionate incarceration rate of African Americans, Hispanics, and poor defendants.[105] Taken as a whole, these policies of money bail have wreaked havoc on society from both a micro and macro level, destroying the lives of individuals, overcrowding jails, and seeking punishment over understanding.[106] If a nation is to be judged on how it treats its lowest citizens,[107] then America has hopelessly failed.

A. Individual Costs: The Effect of Pretrial Detention on Detainees

When a defendant is unable to post bail, often in relation to a relatively minor crime,[108] the adjudication of their criminal case is drastically affected.[109] For example, in a recent comprehensive study of 153,407 defendants booked into a Kentucky jail, researchers found that those defendants who are detained "for the entire pretrial period are much more likely to be sentenced to jail and prison."[110]

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[104] SUBRAMANIAN ET AL., *supra* note 13, at 5.

[105] Demetria D. Frank, *Prisoner to Public Communication*, 84 BROOK. L. REV. 115, 116 n.6 (2018) (discussing the severe social consequences in the poor and minority communities that suffer "disproportionally high incarceration rates").

[106] *See infra* Sections I.A., II.B.

[107] *See supra* note 1.

[108] *See* Brand & Pishko, *supra* note 101.

[109] Pretrial detention increases both the likelihood of conviction and the length of sentencing. *See* Cherise Fanno Burdeen, *The Dangerous Domino Effect of Not Making Bail*, ATLANTIC (Apr. 12, 2016), https://www.theatlantic.com/politics/archive/2016/04/the-dangerous-domino-effect-of-not-making-bail/477906/ [https://perma.cc/EJ2C-NF9W]; *see also* Christopher T. Lowenkamp et al., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, ARNOLD FOUND. 4 (Nov. 2013), https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf [https://perma.cc/VL5W-26HW].

[110] Lowenkamp et al., *supra* note 109.

The study found that "[l]ow-risk defendants[111] who were detained for the entire pretrial period were 5.41 times more likely to be sentenced to jail and 3.76 times more likely to be sentenced to prison," in comparison to those who were "released at some point before trial."[112] This disparity continued in terms of sentencing, as the study found that defendants detained for the entire pretrial period were also found to receive 2.78 times longer sentences than those defendants released at some point during the pretrial period.[113] These findings are not individual to the Kentucky system, as many other studies have similarly shown increased rates of conviction and sentence times for defendants detained prior to trial.[114] Furthermore, "[t]hese effects of pretrial detention appear the same even after controlling for factors such as the seriousness of the charges, prior convictions, and evidence against the defendant."[115]

Pretrial detention accounts for these disparate figures for a myriad of reasons. First, pretrial detention hampers the defendant's ability to adequately formulate a defense.[116] A defendant imprisoned prior to trial has a reduced ability to effectively interact with their defense attorney.[117] This is because the defendants are often imprisoned a great distance from the court in which they are tried, which thereby reduces their ability

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[111] The study used "a research based and validated assessment tool" called the Kentucky Pretrial Risk Assessment (KPRA). The KPRA used 12 risk factors (offense class, criminal history, failure to appear, etc.) to categorize the sample size into three tiers: low risk, moderate risk, and high risk. *Id.* at 8.

[112] *Id.* at 4.

[113] *Id.* at 14.

[114] *See* Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471, 498 (2016) ("Defendants assessed money bail have a 6-percentage-point (12 percent) higher chance of conviction and a 0.7-percentage-point higher yearly probability of being charged with further crimes (or a 6–9 percent increase) [in Philadelphia jails]."); Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. ECON. & ORG. 511, 532 (2018) (finding a 6.2% increase in likelihood of conviction for pretrial detainees); Miller, *supra* note 16.

[115] Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1972–73 (2005); *cf* STEVENS H. CLARKE ET AL., THE EFFECTIVENESS OF BAIL SYSTEMS: AN ANALYSIS OF FAILURE TO APPEAR IN COURT AND REARREST WHILE ON BAIL 36 (1976) (study that notes that it would not be desirable to remove the financial incentives of cash bail if the amount is set in relation to the seriousness of the crime charged).

[116] *See* Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1355–56 (2014) ("The defendant must recruit friends or family members to collect evidence and witnesses and will often have difficulty communicating with his attorney due to limited visiting hours."); Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 234 (2018) ("[I]t is also possible that pretrial release affects a defendant's ability to prepare an adequate defense or negotiate a settlement with prosecutors. For example, a defendant may have a harder time gathering exculpatory evidence if he is detained.").

[117] Wiseman, *supra* note 116, at 1355.

to communicate with counsel.[118] Additionally, pretrial detention can interfere with the ability to even gain effective counsel in the first place; incarceration can result in financial hardship, leading to a "[lower] likelihood of obtaining private counsel."[119]

Another factor contributing to the disproportionate sentencing rate for pretrial detainees is the pretrial detainee's guilty plea, culminating from a desire to secure a quicker release.[120] Pretrial detainees are frequently imprisoned in substandard local and municipal jails, where conditions are often harsher than the prisons housing those actually convicted of a crime.[121] These facilities are typically "locally operated jails where resources are scarce[], the staff is 'less professionalized,' classification of inmates is haphazard, and rapid turnover makes for generally chaotic conditions."[122] Faced with the prospect of continuing to be jailed in often subhuman conditions,[123] losing their employment,[124] and risking being labeled a convict in the eyes of a jury,[125] defendants who cannot afford bail will often be compelled to plead guilty to avoid additional jail time.[126]

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[118] *See* Douglas J. Klein, Note, *The Pretrial Detention "Crisis": The Causes and the Cure*, 52 WASH. U.J. URB. & CONTEMP. L. 281, 294 (1997).

[119] *See* Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 555 (2012).

[120] *See* Dobbie et al., *supra* note 116, at 234 ("[I]t is possible that pretrial release decreases a defendant's incentive to plead guilty to obtain a faster release from jail."); Covert, *supra* note 103 ("Those who are detained before trial are far more likely to plead guilty—a desperate attempt to regain their freedom, even if temporarily.").

[121] *See* Benjamin v. Fraser, 343 F.3d 35, 52–56 (2d Cir. 2003) (noting inadequate ventilation, lighting, heating, and food contaminated with vermin and fecal matter in New York jails); Owens v. Scott Cty. Jail, 328 F.3d 1026, 1026 (8th Cir. 2003) (defendant, who shared a one-man cell with another inmate, had urine splashed on him and his blankets when cellmate used bathroom); *see also* Appleman, *supra* note 78, at 1312; David C. Gorlin, Note, *Evaluating Punishment in Purgatory: The Need to Separate Pretrial Detainees' Conditions-of-Confinement Claims from Inadequate Eighth Amendment Analysis*, 108 MICH. L. REV. 417, 418–19 (2009) ("One court has colorfully invoked the biblical notion of 'purgatory' to describe the condition of those persons held by the government prior to a formal adjudication of guilt." (citing Jones v. Blanas, 393 F.3d 918, 933 (9th Cir. 2004))).

[122] Gorlin, *supra* note 121, at 419.

[123] Jail buildings can contain "mold, poor ventilation, lead pipes, and asbestos," "a vector of contagious diseases," and some jails even house "low-level detainees with dangerous convicted felons." Appleman, *supra* note 78, at 1318, 1321.

[124] *See* Gerstein v. Pugh, 420 U.S. 103, 114 (1975) ("Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships."); Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html [https://perma.cc/H5EG-Y7BH] (noting that missing one day of work for some people can result in losing their job, housing, and disrupt family ties).

[125] *See* Brett Snider, *Can an Orange Jumpsuit Prejudice a Jury*, FINDLAW BLOTTER (May 7, 2014), https://blogs.findlaw.com/blotter/2014/05/can-an-orange-jail-jumpsuit-prejudice-a-jury.html [https://perma.cc/GKT2-JBZB] ("It may not surprise you, but how a criminal defendant appears before a jury is incredibly important in trial."); Yang, *supra* note 49, at 1419 ("[I]f detained defendants appear at arraignment and at trial in shackles, prosecutors and jurors may be biased in favor of finding the defendant guilty and sentencing a defendant to prison time.").

[126] *See* Yang, *supra* note 49, at 1419.

Pretrial detention has an even more significant impact on minorities. It is well established that the criminal justice system has disparately impacted racial minorities in the United States.[127] Consequences of incarceration are felt the most strongly in African American and Latino communities, whose members are disproportionately jailed in comparison to the rest of the population.[128] Despite African Americans and Latinos only making up thirty percent of the general population, they constitute fifty-one percent of the population in American jails.[129] Local differences in the rate of detention can be even starker; in New York City alone "blacks are jailed at nearly [twelve] times the rate of whites and Latinos more than five times the rate of whites."[130] A plethora of factors accounts for these inequitable figures including police practices in low-income minority communities, disadvantages minorities face in the court system, and disproportionate pretrial detention figures.[131]

Cash bail perpetuates these disparities because a minority defendant is less likely to be able to afford bail than a white defendant, due in part, to the well-established linkages between wealth and race.[132] Even though bail amounts are similar for both defendants, minority defendants are locked in a cyclical system of disadvantage.[133] Higher rates of incarceration amongst minority defendants leads to higher rates of unemployment.[134] Because police practices target minority neighborhoods, these defendants

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[127] *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2 (rev. ed., 2012); Andrew Kahn & Chris Kirk, *There's Blatant Inequality at Nearly Every Phase of the Criminal Justice System*, BUS. INSIDER (Aug. 9, 2015), https://www.businessinsider.com/theres-blatant-inequality-at-nearly-every-phase-of-the-criminal-justice-system-2015-8 [https://perma.cc/C4K7-D78S]; SUBRAMANIAN ET AL., *supra* note 13, at 11.

[128] African American and Latino defendants are less likely to afford bail and more likely to be incarcerated than white defendants. BAIL PRIMER, *supra* note 33, at 7.

[129] SUBRAMANIAN ET AL., *supra* note 13, at 15.

[130] *Id.* at 11.

[131] *See id.* at 15; JENNIFER FRATELLO ET AL., VERA INST. JUST., COMING OF AGE WITH STOP AND FRISK: EXPERIENCES, PERCEPTIONS, AND PUBLIC SAFETY IMPLICATIONS 3 (Sept. 2013), https://www.vera.org/publications/coming-of-age-with-stop-and-frisk-experiences-self-perceptions-and-public-safety-implications [https://perma.cc/7HJF-F3KS] (highlighting the disproportionate impact of stop and frisk policies on minorities, especially on young black males).

[132] The racial disparities in pre-incarceration wealth for those who cannot make bail is telling. The Prison Policy Initiative found that African American males who are unable to afford bail have a pre-incarceration income of $11,275, while white males have a pre-incarceration income of $18,283. Among non-incarcerated people the difference is still sharp. Black males have an income of $31,284, while their white counter-parts have an income of $43,560. RABUY & KOPF, *supra* note 10, at 2.

[133] *See* Jean Bonhomme, *African-American Males in the United States Prison System: Impact on Family and Community*, 3 J. MEN'S HEALTH & GENDER 223, 225 (2006) (noting factors like racism, lack of job opportunities, and class discrimination "create a vicious cycle that frequently relegates serial offenders to a permanently marginalized status").

[134] *See* Roberts, *supra* note 18, at 1293 ("[I]ncarceration depletes black communities of their workforce and income, thereby impairing their economic stability.").

are often rearrested and, due to their inability to afford bail, incarcerated.[135] Furthermore, much of the growth in jails has been attributed to an increased emphasis on drug enforcement.[136] Black men are arrested at disproportionate rates for drug possession, despite similar rates of drug usage to white, and therefore are even more likely to land in jail.[137]

Finally, a system that predicates freedom on wealth is bound to destroy the lives of many indigent defendants, even when discounting the impact of race. Though figures vary, the Bureau of Justice Statistics places the median bail amount for a felony offense to be around $10,000.[138] Defendants unable to meet bail have overall income levels drastically lower than non-incarcerated people.[139] Sixty percent of individuals who are unable to afford bail fall into the poorest third of society, while eighty percent fall into the bottom half of society.[140] Thus, in operating a system where wealth buys freedom and poverty equals imprisonment, we have condemned and forgotten a troubling number of individuals. A true lost generation.

B. Social Costs

As if money bail's effect on individuals, families, and communities is not distressing enough, the system also places a burdensome toll on society as a whole.[141] The increased rate of

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[135] For example, despite asserting they would not arrest individuals for low-level marijuana possession, in the first three months of 2018 the NYPD made 4,081 arrests for criminal possession of marijuana. Ninety-three percent of those arrested were people of color. Innocence Staff, *Racial Disparities Evident in New York City Arrest Data for Marijuana Possession*, INNOCENCE PROJECT (May 14, 2018), https://www.innocenceproject.org/racial-disparities-in-nyc-arrest-data-marijuana-possession/ [https://perma.cc/CDC6-PHTE]; *see also* Roberts, *supra* note 18, at 1276 ("[A]nalysis shows not only that incarceration is persistently concentrated in New York City's poorest neighborhoods, but also that these neighborhoods received more intensive and punitive police enforcement and parole surveillance throughout a period of general decline in crime.").

[136] "From 1981 until 2006, when they peaked, total drug arrests more than tripled, from 560,000 to 1.9 million, and the drug arrest rate (per 100,000) grew 160 percent. The share of people in jail accused or convicted of a drug crime increased sharply in the 1980s . . . " SUBRAMANIAN ET AL., *supra* note 13, at 9.

[137] "Although whites have a higher rate of illegal drug use, [sixty percent] of offenders imprisoned for drug charges in 1998 were black." Roberts, *supra* note 18, at 1275.

[138] This $10,000 figure is based on national data from 2009. RABUY & KOPF, *supra* note 10, at 1 n.9.

[139] *Id.* at 2 (noting that defendants incarcerated due to their inability to make bail have a median annual income of $15,109 prior to incarceration, which is forty-eight percent lower than that of non-incarcerated individuals).

[140] *See id.*

[141] For example, the New York City Comptroller released a report stating that the marginal cost to detain individuals before trial cost the city around $100 million annually. SCOTT M. STRINGER, N.Y.C. DEP'T. COMPTROLLER, THE PUBLIC COST OF PRIVATE BAIL: A PROPOSAL TO BAN BAIL BONDS IN NYC 5 (Jan. 17, 2018), https://comptroller.nyc.gov/reports/the-public-cost-of-private-bail-a-proposal-to-ban-bail-bonds-in-nyc/ [https://perma.cc/3Y32-NRAL].

incarceration due to the inability to pay bail results in giant costs to city or state budgets.[142] For example, the ABA observed that the cost to New York City, and consequently its taxpayers, was $45,000 annually for housing a *single* pretrial detainee.[143] Nationally, the United States Department of Justice had stated that housing pretrial detainees costs taxpayers around $9 billion dollars annually.[144]

The cost to society would be mitigated if the cash bail system actually contributed to greater community safety, but the benefits of the system are questionable at best.[145] While it is certainly true that jails hold some dangerous individuals accused of committing violent crimes, "nearly [seventy-five] percent of the population of both sentenced offenders and pretrial detainees are in jail for nonviolent traffic, property, drug, or public order offenses."[146] In New York City, for example, in roughly fifty percent of cases where a defendant was imprisoned, the crime charged was a misdemeanor or less.[147] Despite the level of a violation, nearly every study conducted on money bail has shown that its efficacy in keeping defendants from fleeing is arguably non-existent. For instance, "[i]n the seventy-five largest counties in the country, twenty-one to twenty-four percent of state court felony defendants who were released on bail or personal recognizance between 1990 and 2004 failed to appear at trial."[148]

The sad irony of these detention consequences is that those who should have been granted the presumption of innocence are instead deemed guilty of the crime of being impoverished. Some are forced to plead guilty to crimes they did not commit, while others are punished too harshly for, what in many cases, amounts to a lapse of judgment.[149] The system itself is ineffective and costly, and

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[142] *See* Wiseman, *supra* note 116, at 1357 ("During the recent economic downturn, the cost of money bail to society has been raised as a more practical rallying flag for reform.").

[143] Criminal Justice Section, State Policy Implementation Project, AM. B. ASS'N, https://www.americanbar.org/content/dam/aba/administrative/criminal_justice/spip_handouts.authcheckdam.pdf [https://perma.cc/V433-NFCH].

[144] Eric Holder, Att'y Gen., U.S. Dep't of Justice, Address at the National Symposium on Pretrial Justice (June 1, 2011), http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110601.html [https://perma.cc/3LCG-84FQ].

[145] For example, two years after New Jersey essentially ceased the use of cash bail violent crime numbers had dropped by nearly thirty percent. Scott Shackford, *Garden City Crime is Down Since New Jersey Ditched Cash Bail*, REASON (Dec. 6, 2018), https://reason.com/blog/2018/12/06/crime-continues-to-decline-in-new-jersey [https://perma.cc/S7V7-VXHK]; *see also* Baradaran & McIntyre, *supra* note 119, at 502 (finding that if we released twenty-five percent of felony defendants pretrial there would be no increases in pretrial crime).

[146] SUBRAMANIAN ET AL., *supra* note 13, at 5.

[147] *Id.* In Los Angeles Jails, similarly, the biggest group of pretrial detainees were those charged with minor crimes like traffic or vehicle related offenses. *Id.*

[148] Wiseman, *supra* note 116, at 1361.

[149] *See* Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 714 (2017) (due to the negative consequences of pretrial detention "a detained person may plead guilty—even if innocent—simply to get out

without question, is of little use in a society that prides itself on justice. As Professor Laura Appleman of Willamette University stated, "here, in the rotting jail cells of impoverished defendants—still innocent before proven guilty—are the Shadowlands of Justice: the murky corners of the criminal justice system, where the lack of criminal procedure has produced a darkness unrelieved by much scrutiny or concern on the part of the law."[150]

III. ALTERNATIVES ARE MORE OF THE SAME

There has been a growing movement to end the system of cash bail at both a federal and state level.[151] These reform methods, though commendable in their recognition of the inefficacious nature of cash bail, suffer from some of the same serious deficiencies as cash bail. In crafting bail reform laws, state legislatures should take care to avoid two of the more popular methods of reform: (1) risk assessment tools; and (2) electronic monitoring. Risk assessment tools are of questionable efficacy and utilize racially biased data to predict risk, while electronic monitoring is an onerous and unnecessary punitive measure.

A. Risk Assessment Tools

In the summer of 2018, California became the first state to fully eliminate cash bail.[152] What drew much coverage was not the obvious negative reaction of the bail bond industry, but the outcry from the same activists who had originally advocated for the elimination of the cash bail system.[153] The anger stemmed from

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of jail"); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1347 (2012) (noting that the inability to afford bail and the potential deprivations associated with pretrial detention "can create the perfect storm of wrongful pleas"); *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, HUMAN RIGHTS WATCH (Dec. 5, 2013), http://hrw.org/node/120933 [https://perma.cc/EBT7-LL7A] (illustrating the "trial penalty," where defendants who choose to go forgo a plea bargain face the risk of excessive and severe sentences).

150 Appleman, *supra* note 78, at 1302.

151 *See, e.g.*, Covert, *supra* note 103; *Aiming for Fairness, Virginia City Puts Limits on Cash Bail*, ASSOCIATED PRESS (Jan. 8, 2019), https://wtop.com/virginia/2019/01/aiming-for-fairness-virginia-city-puts-limits-on-cash-bail/ [https://perma.cc/859Q-XJV5] (reporting top prosecutor in Norfolk, Virginia intends to end cash bail in most cases).

152 Madison Park, *California Eliminates Cash Bail in Sweeping Reform*, CNN (Aug. 28, 2018, 11:08 PM ET), https://www.cnn.com/2018/08/28/us/bail-california-bill/index.html [https://perma.cc/95EQ-KSYE]. Washington, D.C. had essentially eliminated cash bail in the 90s. *See* Sabri Ben-Achour, *Washington D.C. Has Figured a Way Around Money Bail*, MARKETPLACE (Oct. 21, 2016, 2:45 PM), https://www.marketplace.org/2016/10/21/wealth-poverty/washington-dc-has-figured-out-way-around-money-bail [https://perma.cc/AAW7-QVCG]; Rachel Marshall, *America's Bail System Is a War on the Poor. Let's Get Rid of It.*, VOX (Aug. 24, 2016), https://www.vox.com/2016/8/24/12590060/doj-bail-unconstitutional [https://perma.cc/QXG8-URMD].

153 *See* Laurel Eckhouse, *California Abolished Money Bail. Here's Why Bail Opponents Aren't Happy.*, WASH. POST (Aug. 31, 2018), https://www.washingtonpost.com/news/monkey-

California's replacement of cash bail with risk assessment tools, a substitution that anti-bail advocates correctly felt perpetuates the same racial disparities as the original system.[154]

Pretrial risk assessment tools utilize algorithms, eschewing monetary standards, to predict a defendant's risk of flight and dangerousness to the community.[155] These tools typically rely on actuarial data and a checklist of risk factors "that statistically correlate with nonappearance in court or commission of a crime pretrial," in order to "predict how likely it is that someone will miss an upcoming court date or commit a crime before trial."[156]

The most popular risk assessment tool, a result of collaboration between the State of New Jersey and the Arnold Foundation, is the Public Safety Assessment (PSA).[157] The PSA uses nine different risk factors: "age at current arrest, current violent offense, pending charges, prior misdemeanor conviction, prior felony conviction, prior violent conviction, prior failure to appear in past two years, prior failure to appear older than two years, and prior sentence to incarceration."[158] Based on these factors, a pretrial defendant receives three scores on the following: failure to appear, likelihood of new criminal activity, and likelihood of new violent criminal activity.[159] The scores have different banded categories, representing the percentage chance that someone would flee, commit a crime, or commit a violent crime.[160] The scores themselves do not warrant detention, but the judge and policymakers, in analyzing the defendant's scores, must decide whether the threshold of risk warrants pretrial detention.[161]

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cage/wp/2018/08/31/california-abolished-money-bail-heres-why-bail-opponents-arent-happy/ [https://perma.cc/P6AA-Y4FD].

154 *See* Jeremy B. White, *California Ended Cash Bail. Why Are So Many Reformers Unhappy About it?*, POLITICO MAG. (Aug. 29, 2018), https://www.politico.com/magazine/story/2018/08/29/california-abolish-cash-bail-reformers-unhappy-219618 [https://perma.cc/K3XV-93L4] (noting that reformists are against risk assessment tools due to their onerous release requirements and racial biases); Ed Kilgore, *California Abolishes Cash Bail Despite Criticism from Left and Right*, N.Y. INTELLIGENCER (Aug. 29, 2018), http://nymag.com/intelligencer/2018/08/california-abolishes-cash-bail-despite-left-right-criticism.html [https://perma.cc/5GF9-GZAW] (detailing criticism of California's risk assessment tool including complaints that the tools are biased against minority communities).

155 Richard F. Lowden, *Risk Assessment Algorithms: The Answer to an Inequitable Bail System*?, 19 N.C.J.L. & TECH. 221, 229–31 (2018).

156 *Bail Reform*, *supra* note 23, at 1131.

157 LAURA & JOHN ARNOLD FOUND., PUBLIC SAFETY ASSESSMENT: RISK FACTORS AND FORMULA 2 (2016).

158 *Bail Reform*, *supra* note 23, at 1131 (citing LAURA & JOHN ARNOLD FOUND., PUBLIC SAFETY ASSESSMENT: RISK FACTORS AND FORMULA 2 (2016)).

159 *Id.*

160 AM. CIVIL LIBERTIES UNION OF N.J. ET AL., THE NEW JERSEY PRETRIAL JUSTICE MANUAL 7 (2016).

161 *Bail Reform*, *supra* note 23, at 1132.

The jurisdictional implementation of risk assessment tools has not been wholly without success. New Jersey, for example, saw its pretrial detention rate decline by nearly a third since it adopted the PSA in 2017.[162] Nonetheless, New Jersey's success is tempered by the shortcomings of the PSA in other jurisdictions. In Lucas County, Ohio, for instance, the implementation of the PSA actually led to an increase in pretrial detention rates.[163] Kentucky, hailed as the "shining example" of risk assessment success, has only seen "a small increase in the use of non-financial bonds, and essentially no effect on releases, FTAs, pretrial crime, or racial disparities in detention."[164]

The mixed results of risk assessment tools are likely the result of a series of factors. For one, determining what threshold of risk warrants pretrial detention is a subjective determination that varies amongst the risk assessment jurisdictions.[165] Within the PSA, New Jersey recommends pretrial detention only for arrestees with the highest risk scores, which amounts to around five percent of defendants.[166] In contrast, Mecklenburg County, another PSA user, recommends pretrial detention for all defendants except those who are labeled "low or below-average."[167] If a jurisdiction fails to calibrate the risk threshold for release to an equitable level, then the change in pretrial detention rates could be negligible.

But even when risk rates are calibrated to promote pretrial release, it is unclear whether the risk assessment system itself is responsible for the pretrial release success. In New Jersey and Kentucky, for instance, the risk assessment tool was just one small part of their pretrial reform efforts.[168] Both states expanded pretrial services for defendants, increased the rate of cite and release,[169] and implemented other, educational, reforms.[170] When jurisdictions

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[162] Megan T. Stevenson, *Risk Assessment: The Devil's in the Details*, CRIME REP. (Aug. 31, 2017), https://thecrimereport.org/2017/08/31/does-risk-assessment-work-theres-no-single-answer/ [https://perma.cc/AB93-V6CR].

[163] *Id.*

[164] Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 307, 310 (2018).

[165] *See id.* at 316; Stevenson, *supra* note 162.

[166] Stevenson, *supra* note 162

[167] *Id.*

[168] *See* John Raphling, *Human Rights Watch Advises Against Using Profile-Based Risk Assessment in Bail Reform*, HUMAN RIGHTS WATCH (July 17, 2017, 12:00 AM EDT), https://www.hrw.org/news/2017/07/17/humanrights-watch-advises-against-using-profile-based-risk-assessment-bail-reform [https://perma.cc/FLB8-68N2]; *see also* Rachel Smith, *Condemned to Repeat History? Why the Last Movement for Bail Reform Failed, and How This One Can Succeed*, 25 GEO. J. POVERTY L. & POL'Y 451, 469 (2018).

[169] Cite and release policies permit law enforcement officers to issue a citation that "releases a person on a promise to appear in court or pay a fine." *Citation in Lieu of Arrest*, NAT'L CONF. ST. LEGISLATURES (MAR. 18, 2019), http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx [https://perma.cc/N777-9SEM].

[170] *See* Ralphing, *supra* note 168.

adopted risk assessment tools as their only source of reform, in many cases situations actually worsened: Harris County, Ohio, adopted the PSA in place of cash bail, and "has seen increased rates of pretrial detention and increased rates of early guilty pleas."[171] Apart from the efficacy of risk assessment tools, the underlying risk score calculation also proves problematic.

Risk assessment algorithms can serve as poor indicators of future risk, and a jurisdiction utilizing such algorithms can potentially perpetuate the same disparate treatment of minorities that cash bail presently does.[172] In 2016, Pro Publica conducted a comprehensive study on risk assessment tools, obtaining the risk scores assigned to over seven thousand defendants arrested in Broward County, Florida.[173] The study found that the scores had little correlation with actually predicting the risks of letting a pretrial defendant free. For example, only twenty percent of defendants whose risk scores predicted they would commit violent crimes actually committed such crimes. Even when taking into account other crimes, including misdemeanors, "the algorithm was somewhat more accurate than a coin flip," only accurately predicting future crime in sixty-one percent of the cases.[174] A recent study went as far as saying that risk assessment algorithms are "no more accurate or fair than predictions made by people with little or no criminal justice expertise."[175]

Beyond the accuracy of the tools, many members of the legal community have argued that by relying on these algorithms, and reducing an individual's life into neat categories, the detention process fails to account for structural racism and biases present in the U.S. criminal justice system.[176] These claims have

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[171] *Id.* Similarly, when Maryland "replaced money bail with risk assessment, the number of defendants allowed to return home to await trial increased, but a significant number committed crimes and missed court dates." Smith, *supra* note 168, at 469.

[172] *See* Jennifer L. Doleac & Megan Stevenson, *Are Criminal Risk Assessment Scores Racist?*, BROOKINGS INST. (Aug. 22, 2016), https://www.brookings.edu/blog/up-front/2016/08/22/are-criminal-risk-assessment-scores-racist/ [https://perma.cc/5W5G-TSMF]; *see also supra* Section II.A.

[173] Julia Angwin et al., *Machine Bias*, PRO PUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing [https://perma.cc/K4H9-TL4A].

[174] *Id.*

[175] Julia Dressel & Hany Farid, *The Accuracy, Fairness, and Limits of Predicting Recidivism*, SCI. ADVANCES, Jan. 2018, at 1.

[176] Former Attorney General Eric Holder, for example, was opposed to the use of risk assessment tools due to the risk of disparate treatment of racial minorities. Massimo Calabresi, *Exclusive: Attorney General Eric Holder to Oppose Data-Driven Sentencing*, TIME (July 31, 2014, 1:35 PM), http://time.com/3061893/holder-to-oppose-data-driven-sentencing/ [https://perma.cc/6QR3-YD5J]. Similarly, in July of 2018, a coalition of over 100 organizations released a joint statement expressing their concerns that risk assessment tools will worsen incarceration rates and racial disparities. Shin Inouye, *More Than 100 Civil Rights, Digital Justice, and Community-Based Organizations Raise Concerns About Pretrial Risk Assessment*, LEADERSHIP CONFERENCE ON CIV. & HUMAN RTS. (July 30,

not been unfounded, as the Pro Publica study also found that the tools created racial disparities in risk scores between black and white defendants.[177] There, "[t]he formula was particularly likely to falsely flag black defendants as future criminals, wrongly labeling them this way at almost twice the rate as white defendants."[178] Other studies of risk assessment tools have also found the tools to be ineffective and discriminatory.[179]

The disparate impact on minority defendants can be traced to the inputs used in the algorithms. Inputs like "prior convictions, prior incarceration sentences, education, [and] employment . . . are themselves the result of racially disparate practices."[180] To illustrate this folly, African American and Hispanic defendants are incarcerated at higher rates than white defendants.[181] These arrest rates are partly driven by the divergent treatment of minorities in the criminal justice system. Minorities are targeted more frequently by law enforcement officials,[182] arrested at higher rates for drug offenses[183] and prosecuted more severely than their white counterparts.[184] In

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2018), https://civilrights.org/more-than-100-civil-rights-digital-justice-and-community-based-organizations-raise-concerns-about-pretrial-risk-assessment/ [https://perma.cc/Q9VJ-86QU]; *cf* Adam Neufeld, *In Defense of Risk-Assessment Tools*, MARSHALL PROJ. (Oct. 22, 2017), https://www.themarshallproject.org/2017/10/22/in-defense-of-risk-assessment-tools?ref=collections [https://perma.cc/STW8-3DQL] ("Used appropriately, algorithms could help in many more areas, from predicting who needs confinement in a maximum security prison to who needs support resources after release from prison.").

[177] Even when isolating a defendant's past crimes or type of crime from race, black defendants were 77% more likely to be labeled as high risks for committing future violent crime. Angwin et al., *supra* note 173.

[178] *Id.* Furthermore, "[w]hite defendants were mislabeled as low risk more often than black defendants." *Id.*

[179] *See* DANIELLE KEHL ET AL., BERKMAN KLEIN CTR. INTERNET & SOC'Y, HARV. L. SCH., ALGORITHMS IN THE CRIMINAL JUSTICE SYSTEM: ASSESSING THE USE OF RISK ASSESSMENTS IN SENTENCING 29 (2017), https://dash.harvard.edu/bitstream/handle/1/33746041/2017-07_responsivecommunities_2.pdf [https://perma.cc/EX3N-YTTM] (discussing studies that show risk scores heavily weigh certain types of crime that are disproportionately policed in predominantly poor and minority neighborhoods); George Joseph, *Justice by Algorithm*, CITYLAB (Dec. 8, 2016), https://www.citylab.com/equity/2016/12/justice-by-algorithm/505514/ [https://perma.cc/5PKE-72N5] (noting that black residents in Baltimore are more likely to receive high risk scores); Wendy Sawyer, *Breaking Open the "Black Box": How Risk Assessments Undermine Judges' Perceptions of Young People*, PRISON POL'Y INIT. (Aug. 22, 2018), https://www.prisonpolicy.org/blog/2018/08/22/blackbox/ [https://perma.cc/R3EQ-86H3] (one of the leading risk assessment tools disproportionately factors in age, with "roughly 60% of the risk score it produces is attributable to age").

[180] Stevenson, *supra* note 164, at 328.

[181] *See id.* at 328 n.158.

[182] *See* Jesse Wegman, *The Injustice of Marijuana Arrests*, N.Y. TIMES (July 28, 2014), https://www.nytimes.com/2014/07/29/opinion/high-time-the-injustice-of-marijuana-arrests.html?partner=rss&emc=rss&smid=tw-nytopinion&_r=0 [https://perma.cc/VSJ2-WTCP].

[183] *See* ACLU, THE WAR ON MARIJUANA IN BLACK AND WHITE 9 (2013).

[184] *See, e.g.*, BESIKI KUTATELADZE ET AL., VERA INST. OF JUST., RACE AND PROSECUTION IN MANHATTAN 3 (2014), https://storage.googleapis.com/vera-web-assets/

essence then, "risk today has collapsed into prior criminal history, and prior criminal history has become a proxy for race."[185] Thus, these tools pose the potential "to significantly aggravate the unacceptable racial disparities in our criminal justice system."[186]

If predicting crime was as easy as plugging digits into a computer, a kind of *Minority Report* type world, then we would have no need for a criminal justice system.[187] But the fact of the matter is that these risk assessment tools are plagued by their reliance on biased data that is "hard to correct for, and [therefore] few even try."[188] Furthermore, "the empirical research evaluating whether outcomes are improved by incorporating algorithmic risk assessment into the decision-making framework is beyond thin; it is close to non-existent."[189] Though eliminating financial constraints is appealing, substituting a system that can be ineffective and racially biased is not an adequate alternative.

B. Electronic Monitoring

Electronic monitoring, as opposed to detention, of pretrial defendants has been on the rise in many jurisdictions.[190] "Most [electronic monitoring] systems consist of an ankle bracelet," linked to a Global Positioning System receiver, which pretrial defendants must wear twenty-four hours a day.[191] For most pretrial defendants, these monitoring devices essentially operate as a form of house arrest.[192] Although there is no centralized database documenting the prevalence of electronic monitoring, it is estimated that in 2014 around one hundred sixty thousand of these devices were employed

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downloads/Publications/race-and-prosecution-in-manhattan/legacy_downloads/race-and-prosecution-manhattan-summary.pdf [https://perma.cc/7QGD-VGHX].

185 Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237, 238 (2015).

186 *Id.*

187 Minority Report, a short story by Phillip K. Dick that later was adopted into a popular film, imagines a dystopian legal system where people are arrested for crimes prior to their commission. *See* PHILIP K. DICK, THE MINORITY (COLLECTED STORIES OF PHILIP K. DICK) (2013); MINORITY REPORT (DreamWorks 2002).

188 Stevenson, *supra* note 164, at 328.

189 *Id.* at 305.

190 *See Electronic Monitoring: Proceed with Caution*, PRETRIAL JUST. INST.: PRETRIAL BLOG (Mar. 20, 2018), https://www.pretrial.org/electronic-monitoring-proceed-caution/ [https://perma.cc/7BKA-RNAQ] (excluding immigration cases, the number of people supervised by electronic monitoring devices between 2005 and 2015 increased from 53,000 to 125,000).

191 JAMES KILGORE, CTR. MEDIA JUST., ELECTRONIC MONITORING IS NOT THE ANSWER: CRITICAL REFLECTIONS ON A FLAWED ALTERNATIVE, 7 (2015), https://centerformediajustice.org/wp-content/uploads/2015/10/EM-Report-Kilgore-final-draft-10-4-15.pdf [https://perma.cc/7CMA-UC4R].

192 *Id.* A person must seek permission from a supervising authority if they need to go to school, therapy, work, etc. *Id.*

in the criminal justice system.[193] Proponents of these tools argue that the cost of the devices are cheaper than incarceration and, unlike pretrial detention, defendants have the freedom to return to their communities and workplaces.[194]

But these devices are often ineffective in ensuring a defendant reappears to court.[195] A 2011 study by the Pretrial Justice Institute found that "utilizing [electronic monitoring] as a condition of pretrial release does not reduce failure to appear or rearrest [rates]."[196] Furthermore, these devices are often more restrictive than they may seem at first glance. A defendant is often subject to a plethora of limitations, including needing permission from their supervisor to leave home, even in light of an emergency.[197]

These devices affect more than just a defendant's movements, and can have drastic effects on families, housing, and medical care.[198] For example, in Cook County one nineteen-year-old defendant could not return to his own home because Cook County did not allow electronically monitored defendants to live in Section 8 housing. This forced the young man to separate from his family and sleep on the floor of his mother's friend's apartment.[199] Compounding the problem with electronic monitoring is that these devices also pose the same racially discriminatory problems present in risk assessment tools.[200] For example, the Chicago Community Bail Fund found that African Americans in Cook County made up around seventy percent of those placed on electronic monitoring, despite being only twenty-five percent of the overall population in Cook County.[201]

The main problem with monitoring devices lies in the reasoning that because these devices are a better alternative than incarceration, they should be used with more frequency. If a

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193 *Id.* at 8.

194 *See* Wiseman, *supra* note 116, at 1349.

195 *See Electronic Monitoring*, *supra* note 190.

196 MARIE VANNOSTRAND ET AL., PRETRIAL JUST. INST., STATE OF THE SCIENCE OF PRETRIAL RELEASE RECOMMENDATIONS AND SUPERVISION, 27 (2011), http://www.ajc.state.ak.us/acjc/bail%20pretrial%20release/sciencepretrial.pdf [https://perma.cc/ZY2S-WRQG].

197 *See* KILGORE, *supra* note 191, at 12.

198 In Cook County, for example, a household must have no residents on parole or on an electronic monitor in order to be approved as a host site. This can have the effect of splitting up families and forcing pretrial defendants to live with family members who do not want them or in areas where accessing employment is burdensome. *See* CHI. CMTY. BAIL FUND, PUNISHMENT IS NOT A "SERVICE": THE INJUSTICE OF PRETRIAL CONDITIONS IN COOK COUNTY 7 (Oct. 24, 2017), https://chicagobond.org/wp-content/uploads/2018/10/pretrialreport.pdf [https://perma.cc/6G75-V7GV]. In Michigan, similarly, a long list of restrictive practices were found including "not being allowed to go to a hospital in an emergency without first obtaining permission from the parole officer, regardless of the time of day or the seriousness of the situation." KILGORE, *supra* note 191, at 12.

199 *See* CHI. CMTY. BAIL FUND, *supra* note 198, at 7–8.

200 *See supra* Section III.A.

201 CHI. CMTY. BAIL FUND, *supra* note 198, at 13.

defendant is deemed safe enough to be sent outside the confinements of jail, it is unclear why he or she must also be penalized with an electronic monitor. This reasoning further ignores the loss of the presumption of innocence. Pretrial defendants *have not* been convicted of crimes and, even if guilty, they are predominantly accused of misdemeanors and small violations.[202] The U.S. system needs to be predicated on a presumption of liberty, not punishment, and these electronic devices do little to further this ideal.

IV. THE LEGISLATIVE SOLUTION: RESTORE AND RELEASE

The proposed solution to the cash bail problem does not lie in an alternative, like risk assessments or an onerous system of pretrial monitoring, but instead lies in a logical proposition: *restore* the presumption of innocence and *release* the majority of pretrial defendants. A system that has thrived on the backs of indigent and minority defendants will not be dismantled by increasing the state supervision of these populations. Instead, this note proposes that a true fix lies in state bail reform legislation that provides for the release of all pretrial defendants charged with misdemeanors and ensures adequate procedural safeguards and a presumption of release for those charged with felony crimes.[203] Using the success of the Washington, D.C. bail system[204] as a baseline, and ameliorating its shortcomings through what studies and the laudable work of community bail funds have taught,[205] states can ensure a just and efficient pretrial system that does not need punitive measures to function.

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[202] *See* Natapoff, *supra* note 149, at 1320 (noting misdemeanors make up the majority of crimes in state courts).

[203] Misdemeanors make up a substantial majority of crime in our state courts. For example, in 2012 misdemeanors accounted for "approximately [eighty] percent of sampled state dockets." *Id.*

[204] Washington, D.C. ended the practice of cash bail in the early '90s. As of 2018, it released over ninety percent of pretrial defendants, and the vast majority of those released return for their next court appearances. *See* Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People From Jail, Explained*, VOX (Oct. 17, 2018), https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality [https://perma.cc/Y3G8-3CT8].

[205] Community bail funds will post the bail for a defendant and, in many cases, provide pre-trial appearance resources, like counseling and text reminders. The bail funds have been a resounding success in most jurisdictions. *See* Arvind Dilawar, *Fighting Mass Incarceration with a DIY Bail Fund*, MASK MAG (Mar. 2018), http://www.maskmagazine.com/the-art-world-issue/struggle/fighting-mass-incarceration-with-a-diy-bail-fund [https://perma.cc/WBZ5-2N5M]. The Brooklyn Community Bail Fund, for example, had ninety-five percent of the defendants they bailed out make all their scheduled court appearances. Furthermore, those who have been released through the actions of the bail fund were three times as likely to have favorable case outcomes. *Our Results*, BROOKLYN CMTY. BAIL FUND (2018), https://brooklynbailfund.org/our-results-1/ [https://perma.cc/DFJ5-JJSF].

A. Washington, D.C. Pretrial System: A Building Block

Ironically, the District of Columbia, the jurisdiction that embodied the punitive turn in America's criminal justice system in the 1970s by becoming the first jurisdiction to authorize preventative detention,[206] has become the gold standard of pretrial detention reform.[207] In 1992, the D.C. Council passed the Bail Reform Act that essentially ended the practice of cash bail in the district.[208] Thus, a defendants' financial means plays no part in pretrial incarcerations.[209]

D.C.'s success is the result of several important implementations. First, the 1992 Bail Reform Act created "a presumption of unconditional pretrial release."[210] Additionally, the Act required a judge to determine if more restrictive conditions are needed, and if so, to impose the "least restrictive . . . condition or combination of conditions that the judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community."[211] The Act also prohibits a judge from imposing financial conditions that results in pretrial detention for the purpose of protecting public safety.[212]

The Act further provides procedural safeguards to ensure both the timeliness of release and adequate justification for detention. The Pretrial Services Agency[213] must interview the defendants within twenty-four hours of arrest, and bring them to court within forty-eight hours of arrest.[214] If the judge believes that preventative detention is necessary, a hearing is held and "[t]he government has the burden to prove by clear and convincing evidence that no conditions of release will reasonably assure appearance at trial and safety of the community."[215]

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[206] President Nixon ushered in this punitive system through his District of Columbia Court Reorganization Act of 1970. The act went beyond just preventative detention and also contained provisions for "mandatory minimum sentences for repeat offenders and 'no-knock' raids." *See* Miller, *supra* note 16.

[207] *See* Marimow, *supra* note 22; Ben-Achour, *supra* note 152.

[208] *See* D.C. CODE § 23-1321 (2019).

[209] *See* CHRISTINE BLUMAUER ET AL., PRINCETON U., ADVANCING BAIL REFORM IN MARYLAND: PROGRESS AND POSSIBILITIES 33 (Feb. 27, 2018), http://wws.princeton.edu/sites/default/files/content/Advancing_Bail_Reform_In_Maryland_2018-Feb27_Digital.pdf [https://perma.cc/B3AE-VMJ8].

[210] DOYLE ET AL., *supra* note 26, at 36; *see also* D.C. CODE § 23-1321(b) (2019).

[211] DOYLE ET AL., *supra* note 26, at 36 (quoting D.C CODE § 23-1321 (c)(1)(B) (2019) (internal quotation marks omitted).

[212] D.C. CODE § 23-1321(c)(3) (2019).

[213] The Pretrial Services Agency is "responsible for gathering information about newly arrested defendants and preparing the recommendations considered by the [c]ourt." *What PSA Does*, PRETRIAL SERVICES AGENCY D.C., https://www.psa.gov/ [https://perma.cc/6SSW-SXZX].

[214] *Court Support*, PRETRIAL SERVICES AGENCY D.C., https://www.psa.gov/?q=programs/court_support [https://perma.cc/7QQT-K8FT].

[215] DOYLE ET AL., *supra* note 26, at 37; (citing D.C. CODE § 23-1322(b)(2)(2019)).

The system has been a great success with pretrial defendants released ninety-four percent of the time.[216] Of those released pretrial, around ninety percent showed up to their subsequent court appearance and only about ten percent were rearrested.[217] "Between 2007 and 2012 . . . . [n]inety-nine percent of released defendants were not rearrested on a violent crime while in the community."[218] D.C. has also employed many non-punitive measures, like drug treatment and job counseling, to avoid recidivism and focus on rehabilitating the pretrial defendant.[219] While these pretrial services and counseling are expensive,[220] they are more affordable due to the reduction in jail population. D.C. is estimated to have saved $398 million dollars annually because of its comprehensive bail reform scheme.[221]

Although D.C.'s pretrial system should be heralded as a success, it still suffers from a few important shortcomings that this note addresses. For example, despite releasing over ninety percent of pretrial defendants, D.C. still employs restrictive, probation-like conditions, such as electronic monitoring, curfews, and supervisory reporting requirements.[222] Conditions like electronic monitoring are invasive, affect the pretrial detainee's individual and family life, and are often employed in a racially discriminatory manner.[223] Furthermore, a court imposing conditional release ignores the fact that the individuals subjected to the restrictions are presumed innocent, and instead treats them as criminals.[224]

D.C. has also pioneered the use of drug testing as a condition of pretrial release, which is equally problematic.[225] The

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[216] DOYLE ET AL., *supra* note 26, at 13.

[217] Of the ten percent that were rearrested, a substantial majority were charged with non-violent crimes. BLUMAUER ET AL., *supra* note 209, at 33.

[218] BAIL PRIMER, *supra* note 33, at 15.

[219] KIDEUK KIM & MEGAN DENVER, D.C. CRIME POL'Y INST., A CASE STUDY ON THE PRACTICE OF PRETRIAL SERVICES AND RISK ASSESSMENT IN THREE CITIES 9–10 (2011).

[220] The Pretrial Services Agency costs around sixty two million dollars annually. BLUMAUER ET AL., *supra* note 209, at 33.

[221] *Id.*

[222] Spurgeon Kennedy, the Director of Research and Analysis for the Pretrial Services Agency of D.C., outlined these conditions: "We supervise the majority of defendants who do get released, and usually those conditions of supervision are things such as drug testing; reporting to a case manager; for those defendants who we believe pose a greater threat to community safety, we have the options of electronic surveillance, or more reporting to case managers." NEAL, *supra* note 10, at 41.

[223] *See supra* Section III.B.

[224] *See* David Feige & Robin Steinberg, *Replacing One Bad Bail System with Another*, N.Y. TIMES (Sept. 11, 2018), https://www.nytimes.com/2018/09/11/opinion/california-bail-law.html [https://perma.cc/XC2D-6Y7C] ("These conditional releases functionally create an Alice-in-Wonderland, sentence-first-verdict-afterward world in which people presumed to be innocent are nonetheless subject to the very sanctions they'd face if actually convicted.").

[225] "[The Pretrial Services Agency] and its predecessor, the D.C. Bail Agency," have been conducting drug testing programs since the '60s. *See* MARY A. TOBORG ET AL., ASSESSMENT OF PRETRIAL URINE TESTING IN THE DISTRICT OF COLUMBIA, NAT'L INST. JUST. vi (1989).

use of drug testing is a burdensome restriction that ignores addiction and disproportionately jails those arrested for drug crimes (i.e., minorities and the poor).[226] Additionally, studies have shown that the use of drug testing as a pretrial condition "has been shown to be ineffective at reducing failure-to-appear rates or pretrial rearrest rates in a number of randomized control trials."[227]

Finally, D.C.'s Pretrial Services Agency, which works in tandem with judicial officers in deciding whether to detain a defendant, employs risk assessment tools. As discussed previously, these tools are of questionable efficacy and can help perpetuate racially disparate detention outcomes.[228] The D.C. risk assessment tool utilizes socioeconomic inputs—including items to measure "criminal history, demographics, current criminal charges, and drug involvement"—which have been shown to contribute to racial disparities in sentencing.[229] D.C.'s success in reforming cash bail is more likely attributable to its comprehensive reform package than risk assessment tools.[230] Beyond the aforementioned reforms, the D.C. bail system also benefits from several unique characteristics: "all of its judges operate in a single courthouse, which may reinforce a culture of pretrial release; it has an extremely high-functioning public defender system, which helps ensure proper representation at pretrial detention hearings; and its pretrial services agency receives funding from the federal government."[231]

In essence, the D.C. system has had much success in eliminating the use of cash bail. Nonetheless, in formulating a solution to cash bail, state legislatures should avoid emulating the use of onerous pretrial restrictions and risk assessment tools. Instead, state legislation should focus on D.C.'s elimination of cash bail and its presumption towards release. It should also build upon D.C.'s procedural protections to ensure that felony defendants are afforded their presumption of innocence.

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[226] *See* VANNOSTRAND ET AL., *supra* note 196, at 20–24.

[227] Megan Stevenson & Sandra G. Mayson, *Bail Reform: New Directions for Pretrial Detention and Release*, *in* REFORMING CRIMINAL JUSTICE, VOL. 3: PRETRIAL AND TRIAL PROCESSES 21, 44 (Erik Luna, ed., 2017).

[228] *See supra* Section III.A.

[229] *See* Matthew DeMichele et al., *The Public Safety Assessment: A Re-Validation and Assessment of Predictive Utility and Differential Prediction by Race and Gender in Kentucky*, at 8–9 (Apr. 25, 2018); *supra* Section III.A.

[230] *See* Raphling, *supra* note 168 (arguing that risk assessment tools are not successful absent other pretrial reform measures).

[231] BAIL PRIMER, *supra* note 33, at 15.

B. The True "Alternative"

In order to combat the inequities of cash bail and restore the presumption of innocence, state legislatures should formulate legislation that releases all misdemeanor defendants and provides adequate procedural safeguards to the felony defendant population. Releasing misdemeanor defendants will not only mitigate the problem of mass incarceration but will also be a positive step towards ending the racial discrimination prevalent in the U.S. criminal justice system. Furthermore, by providing felony defendants with adequate procedural safeguards, through longer bail hearings and the right to counsel, we would ensure that the presumption of innocence is more than a platitude, but essential to the United States' constitutional fabric.

1. Release Pretrial Defendants Charged with Misdemeanors

Advocating for the release of the vast majority of pretrial defendants[232] would undoubtedly ring the alarm bell of pretrial dangerousness to the community and the risk of nonappearance. Community bail funds, however, have shown that this risk is not pervasive and more based in fear.[233] Community bail funds are organizations that post the monetary bail on a pretrial defendant's behalf and often supervise and aid the defendant in reappearing to court.[234] The funds do not impose restrictive conditions, but instead, often utilize simple check-in requirements if the specific fund so requires.[235] These check-in requirements can consist of simple, non-invasive tools, like phone or text notifications to ensure that a

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[232] Natapoff, *supra* note 149, at 1320 (noting that misdemeanor crimes make up the majority of a state's docket).

[233] Critics of bail funds often use public safety rhetoric and other forms of fearmongering to denigrate bail funds. *See* Raven Rakia, *New Orleans Prosecutor Calls New Bail Fund 'Extremely Disturbing'*, APPEAL (Nov. 28, 2018), https://theappeal.org/new-orleans-da-stokes-fears-over-bail-fund/ [https://perma.cc/SH9M-2GVJ] (the District Attorney of Orleans Parish "accused New Orleans Safety and Freedom Fund of 'playing a very dangerous game with public safety'"). But the success of these funds diminishes any such criticism. The New Orleans Safety and Freedom Fund bailed out around two hundred people in 2018, and ninety-two percent of those defendants returned to court. *Id.* Similarly, when the Robert F. Kennedy Human Rights group began bailing out prisoners in Rikers Island, the city's district attorneys, mayor, and police commissioner all warned of the public safety risks associated with such a bail out. The bail fund was very successful: of the ninety people released from Rikers Island who had scheduled court appearances, only two failed to show up. Jeffery C. Mays, *105 New York City Inmates Freed in Bail Reform Experiment*, N.Y. TIMES (Nov. 20, 2018), https://www.nytimes.com/2018/11/20/nyregion/bail-reform-rikers-rfk-nyc.html [https://perma.cc/C5FJ-WVMJ].

[234] Calaway & Kinsley, *supra* note 4, at 826–27.

[235] Laura I Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1535 (2016).

defendant is adequately informed of his or her future court case.[236] Any other services, like a drug or alcohol treatment, are voluntary on the part of the pretrial defendant.[237] These funds have been extremely successful and have shown the senselessness of money bail and probation-like restrictions for pretrial defendants.[238] For example, in New York, bail fund clients reappear for their court cases ninety-five percent of the time, and more importantly, are twice more likely to win their cases than incarcerated individuals.[239]

The community bail funds have illustrated that there is no need for cash bail, or other restrictive conditions, when it comes to misdemeanor defendants.[240] Instead, in releasing these pretrial defendants, states should focus on what the community bail funds have done correctly: providing adequate notification to the defendant.[241] Upon release of pretrial misdemeanor defendants, state legislatures should provide a framework for an adequate notification scheme to ensure reappearance. Studies have shown that notification techniques can drastically increase the reappearance rate of pretrial defendants.[242] For example, "[t]he available research shows that phone-call reminders can increase appearance rates by as much as [forty-two percent], and mail reminders can increase appearance rates by as much as [thirty-three percent]."[243] Even something as simple as improving a court's website can provide a low-cost method of improving reappearance rates.[244]

Practical utilization of non-invasive notification methods has also shown success. In Coconino County, Arizona, for example, the county tested different notification systems and found that the

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[236] *See* Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 603 (2017) ("[T]he involvement of bail funds can vary from frequent and substantive contact, including counseling and legal support, to minimal assistance with rides to court and reminder phone calls.").

[237] Appleman, *supra* note 235, at 1535 (2016).

[238] *See id.* at 1535–37.

[239] Emmeline Clein, *Here's How to Help End Cash Bail*, NATION (Oct. 25, 2018), https://www.thenation.com/article/heres-how-to-help-end-cash-bail/ [https://perma.cc/57KW-8NMQ].

[240] *See, e.g.*, Jancy Hoeffel, *Tulane Professor: New Orleans Bail Rules Are Bad Law and Bad Policy*, ADVOCATE (Dec. 27, 2018, 6:00 PM), https://www.theadvocate.com/baton_rouge/opinion/article_ed3a432a-0304-11e9-b7e8-c392b5182d82.html [https://perma.cc/F6WA-S2D3] ("[S]cholars studying court systems in Colorado and Washington found that failure-to-appear rates were no better for people released on bail bonds than for people released without having to pay.").

[241] *See, e.g.*, *FAQ: What Should Replace Cash Bail?*, *supra* note 28.

[242] In Jefferson County, Colorado, for example, court appearance rates rose from seventy-nine percent to eighty-eight percent when a defendant was reminded of their court date a week in advance. Timothy R. Schnacke et al., *Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Resulting Court Date Notification Program*, 48 CT. REV. 86, 89 (2012).

[243] Stevenson & Mayson, *supra* note 227, at 11.

[244] *Id.* ("[I]mproving court websites so that defendants can easily locate information relevant to their case should increase the likelihood of appearance.").

failure to appear rate was reduced from twenty-five percent in a control group to six percent in the notification group when a caller directly reminded a defendant of their court appearance date.[245] In utilizing these notification techniques, a jurisdiction can reach the results of a successful pretrial system, like D.C., while not intruding on the individual defendant's liberty.

Although critics may be concerned with the dangerousness of releasing such a large number of pretrial defendants, these arguments are misguided, even when putting aside their disregard for the presumption of innocence. In D.C., for example, of the ninety percent of defendants released pretrial, ninety-nine percent of them were not rearrested for a violent crime pretrial.[246] One might contribute these figures to D.C.'s pretrial supervision and restrictions on released defendants, but as discussed, the efficacy of these restrictions has been shown to be wanting.[247] Furthermore, other jurisdictions who have released large amounts of pretrial defendants have seen reductions in violent crime. In New Jersey, for instance, violent crime has decreased by thirty percent since it eliminated cash bail in 2017.[248]

In the long run, pretrial detention of misdemeanor defendants may ultimately compromise public safety. A 2017 Stanford Law Review study conducted an empirical study of a representative group of ten thousand misdemeanor offenders in Harris County, Texas. The study suggested that if the 10,000 defendants were released pretrial, in a period of eighteen months, there would be 2800 new misdemeanor charges and around 1300 new felony charges.[249] In contrast, "if the same group were instead detained, they would accumulate 3400 new misdemeanors and 1700 felonies over the same time period—an increase of 600 misdemeanors and 400 felonies."[250] Other studies have similarly shown that the "short-run gains [of incarceration] are more than offset by long-term increases in post-release criminal behavior."[251]

Even if there is a small risk of recommission of crime, we cannot give up liberty for a false sense of safety. Justice Jackson's statement in *Stack v. Boyle* addressing risk of flight rings equally

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[245] SUBRAMANIAN ET AL., *supra* note 13, at 33–34.

[246] *See* BAIL PRIMER, *supra* note 33, at 15.

[247] *See supra* Section IV.A.

[248] *Is Bail Reform Dangerous? What the Data Really Says*, HOUS. CHRON. (Feb. 25, 2019), https://www.houstonchronicle.com/opinion/editorials/article/Is-bail-reform-dangerous-What-the-data-really-13645640.php [https://perma.cc/264Q-2KJW].

[249] Heaton et al., *supra* note 149, at 768.

[250] *Id.*

[251] Michael Mueller-Smith, *The Criminal and Labor Market Impacts of Incarceration* 3 (Aug. 18, 2015) (unpublished manuscript), https://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2015/09/incar.pdf [https://perma.cc/L9H3-YXPT].

true for the risk of dangerousness: "Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice."[252]

2. Ensure Adequate Procedural Safeguards for Felony Defendants

Felony defendants, though charged with crimes of greater magnitude, should be presumed just as innocent as any other defendant. Thus, regardless of the crime committed, states should ensure that legislation includes a rebuttable presumption of release for felony defendants, with the burden shifted to the prosecution to show why a defendant should be detained. Furthermore, state legislatures should include two additional procedural safeguards to ensure that a felony defendant's liberty is not taken away without due consideration: (1) longer bail hearings; and (2) representation of counsel at bail hearings.

Bail hearings in most jurisdictions are extremely short, and in some cases, these can be as short as a couple of minutes per defendant.[253] For instance, in 2016, Texas Organizing Project obtained a video of bail hearings in Harris County, Texas where, in nearly every case, the judge took a few minutes, and in some cases even seconds, in rendering a bail amount.[254] In one case, the hearing officer set a $5,000 bond for a defendant, ignoring and failing to even discuss the defendant's history of homelessness and dementia.[255]

The length of time for a hearing for a felony defendant needs to be increased substantially because of the loss of liberty that is at stake. Pretrial detention can drastically affect the adjudication of a defendant's case,[256] hence the length of time for a hearing needs to be adequate for a judicial officer to conduct an individualized inquiry into the defendant's case. That way, a court can sufficiently consider and evaluate a defendant's risk level prior to making a determination on incarceration.

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[252] Stack v. Boyle, 342 U.S. 1, 8 (1951).

[253] *See Change Difficult as Bail System's Powerful Hold Continues Punishing the Poor*, INJUSTICEWATCH (Oct. 14, 2016), https://www.injusticewatch.org/projects/2016/change-difficult-as-bail-systems-powerful-hold-continues-punishing-the-poor/ [https://perma.cc/N7KC-46KM] (noting some bail hearings lasted no longer than one minute); Stevenson & Mayson, *supra* note 227, at 4 ("It is common for such [bail] hearings to last only a few minutes.").

[254] Lise Olsen, *Videotapes Reveal Flaws in Harris County Bail Bond Hearings*, HOUS. CHRON. (May 5, 2017, 8:34 AM), https://www.houstonchronicle.com/news/houston-texas/houston/article/Videotapes-reveal-flaws-in-Harris-County-bail-10642138.php [https://perma.cc/GQV3-BB8H].

[255] *Id.*

[256] *See supra* Section II.A.

Critics may argue that costs would increase with lengthier bail hearings, but the loss would be offset by the release of misdemeanor defendants, thereby freeing up both money and the court's time.[257] D.C., for example, saved around $398 million a year by releasing the majority of pretrial defendants. A recent article found that Cuyahoga County, Ohio would save $45 million by switching to the D.C. bail model.[258] Thus, other jurisdictions can use similar savings to fund costs associated with longer hearing times.

Felony defendants should also be provided the right to counsel at bail hearings, a necessary procedural safeguard when their freedom is at stake. In *Rothgery v. Gillespie County*, the Supreme Court held that when defendants hear the charge against them and their liberty is subject to a potential restriction, the adversarial process begins and the Sixth Amendment right to counsel is implicated.[259] The Court stated that once the right to counsel is "attached," the Sixth Amendment requires representation by counsel "at any critical stage of trial."[260] But because the defendant in the case did not challenge the denial of reasonable bail, the Court left open the question of whether a bail hearing constitutes a "critical stage."[261]

Despite the Court's lack of guidance on this issue, it is clear that a bail hearing is a "critical stage" because it can greatly imperil a defendant's liberty interest by potentially increasing a defendant's conviction and sentencing rates.[262] The bail stage, and in many cases, most stages of adjudication, are unfamiliar to a defendant who is not well-versed in the legal process or aware of his or her legal rights. With an attorney's assistance, a defendant has a fair shot at explaining his or her

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257 Washington, D.C. saved around $398 million a year when they ended their cash bail system, nearly $1 million per day. Sara Dorn, *How D.C. Court Reforms Save $398 Million: Impact 2016: Justice For All*, CLEVELAND (May 16, 2016), https://www.cleveland.com/metro/index.ssf/2016/05/how_dc_court_reforms_save_398.html [https://perma.cc/6LX5-VH6K].

258 *Id.*

259 Rothgery v. Gillespie Cty., 554 U.S. 191, 199 (2008).

260 *Id.* at 212.

261 *Id.*; Alexander Bunin, *The Constitutional Right to Counsel at Bail Hearings*, 31 CRIM. JUST. 23, 24 (2016). Three states have interpreted Rothgery to mandate counsel during a bail decision. *See* Gonzalez v. Comm'r of Corr., 68 A.3d 624, 641 (Conn. 2013) (holding that arraignment is a "critical stage" and defendant has right to effective assistance of counsel); DeWolfe v. Richmond, 76 A.3d 1019, 1030 (Md. 2013) (holding that the Due Process Clause of Maryland State Constitution entitles indigent defendant to state-furnished counsel at initial bail hearing); Hurrell-Harring v. New York, 15 N.Y.3d 8, 20–21 (2010) (holding that defendant must be provided counsel at bail hearings because of the liberty interest inherent in these proceedings).

262 *See* Stevenson & Mayson, *supra* note 227, at 10 ("The recent studies showing that pretrial detention substantially increases a defendant's likelihood of conviction and length of sentence support an argument that the bail hearing is a 'critical stage.'").

individual situation and mitigating the risk of a judicial officer conducting a cursory bail hearing.[263]

Some might argue that providing attorneys at these critical stages would result in higher costs. But it is likely quite the opposite. Studies have shown that legal representation of pretrial defendants at the bail stage "can make a significant difference in . . . jail costs."[264] A 2012, New York City study found that those who were incarcerated prior to trial had a worse case outcome, "leading to more costs for incarceration."[265] Jerry Cox, the president of the National Association of Criminal Defense Lawyers, has also stated that representation at bail hearings "leads to greater efficiency and more accurate results."[266]

Representation of felony pretrial defendants at bail hearings would likely not require greater expenditures for public defenders' offices. Public defenders have advocated for such representation, and some have said the implementation would bear them "little additional cost . . . [m]aybe one or two more attorneys."[267] The proposal would also not be new, as Harris County, Texas implemented a pilot program in 2017 that provided for two public defenders to "be present at bail hearings for those accused of misdemeanors and felonies."[268] In essence, by increasing the length of bail hearings and attaching the right to counsel at the bail stage for felony defendants, states can ensure a more just pretrial system for those defendants who are at the greatest risk of losing their freedom.

CONCLUSION

In *Salerno*, Justice Rehnquist stated that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[269] Cash bail has distorted any

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[263] Bunin, *supra* note 261, at 26 (advocating for defense counsel at bail hearings and highlighting that "[i]f individual attributes of defendants were actually reviewed, and indigence was considered, the constitutional violations would be resolved").

[264] Bryan L. Sykes, *Cost Savings to Cook County When Arrested Persons Access Their Right to Legal Defense Within 24 Hours*, FIRST DEF. LEGAL AID (May 2014), https://www.first-defense.org/wp-content/uploads/2015/03/Cost-savings-report4.pdf [https://perma.cc/G3TH-QHFA].

[265] Bunin, *supra* note 261, at 25.

[266] *Id.*

[267] *Public Defender Should Be at All Initial Appearances*, SAN ANTONIO EXPRESS-NEWS (July 21, 2018), https://www.expressnews.com/opinion/editorials/article/Public-defender-should-be-at-all-initial-13092534.php [https://perma.cc/D52N-2EGA (internal quotation marks omitted)].

[268] Mihir Zaveri, *Harris County to Place Public Defenders at Bail Hearings*, HOUS. CHRON. (Mar. 14, 2017), https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-to-place-public-defenders-at-bail-11002089.php [https://perma.cc/23BS-D2YE].

[269] United States v. Salerno, 481 U.S. 739, 755 (1987).

sense of liberty and detention prior to trial has become more than just a limited exception. Pretrial detention has wreaked havoc on the lives of countless pretrial defendants, taking special aim at indigent and minority defendants. But this does not have to be the case. States have recognized that cash bail cannot be the foundation of a just criminal justice system. But states will have a long way to go if they continue to rely on alternatives that perpetuate the same sins of the cash bail system they seek to replace. Instead, state legislatures should pass bail reform laws that release misdemeanor defendants and ensure adequate procedural protection for felony defendants. The presumption of innocence should not be disregarded as a worthless platitude, but instead should be intrinsic to the idea of ordered liberty. By releasing misdemeanor defendants and providing adequate procedural safeguards for felony defendants, we can ensure that there is liberty, untouched by fear.

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